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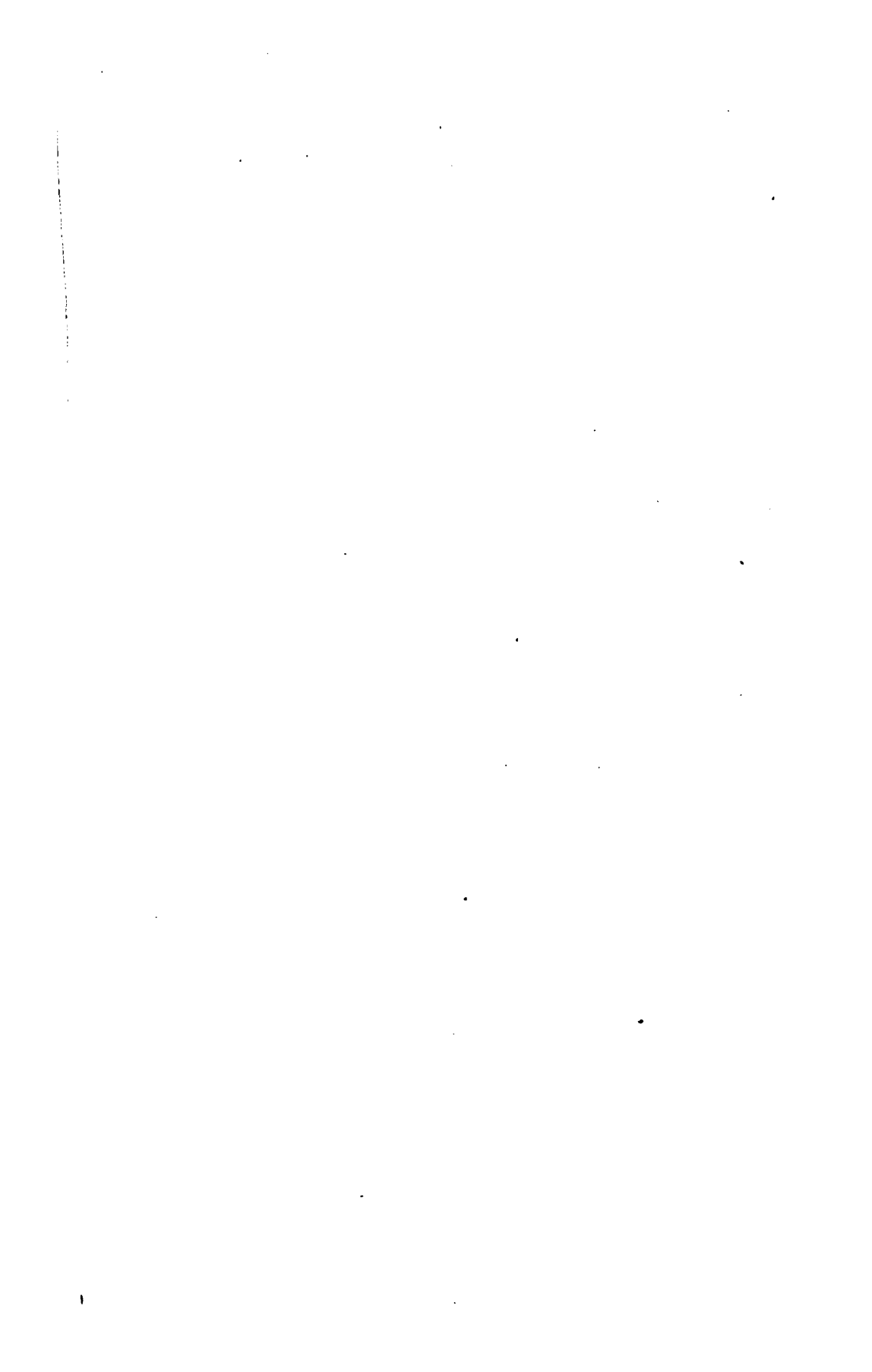
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A COMPILATION OF CASES

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OF

CONTESTED ELECTIONS

TO SEATS IN

The Assembly of the State of New York,

WITH THE

REPORTS OF COMMITTEES ON PRIVILEGES AND
ELECTIONS, AND THE ACTION OF THE
HOUSE THEREON,

FROM 1777 TO 1899, INCLUSIVE.

Prepared and arranged in compliance with a resolution of the Assembly, passed April 28,
1899, under the direction of Archie E. Baxter, Clerk.

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WYNKOOP HALLENBECK CRAWFORD CO.,
STATE PRINTERS,
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1899.

new york: Legislature: Assembly

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STATE OF NEW YORK:

IN ASSEMBLY,

ALBANY, *April* 28, 1899.

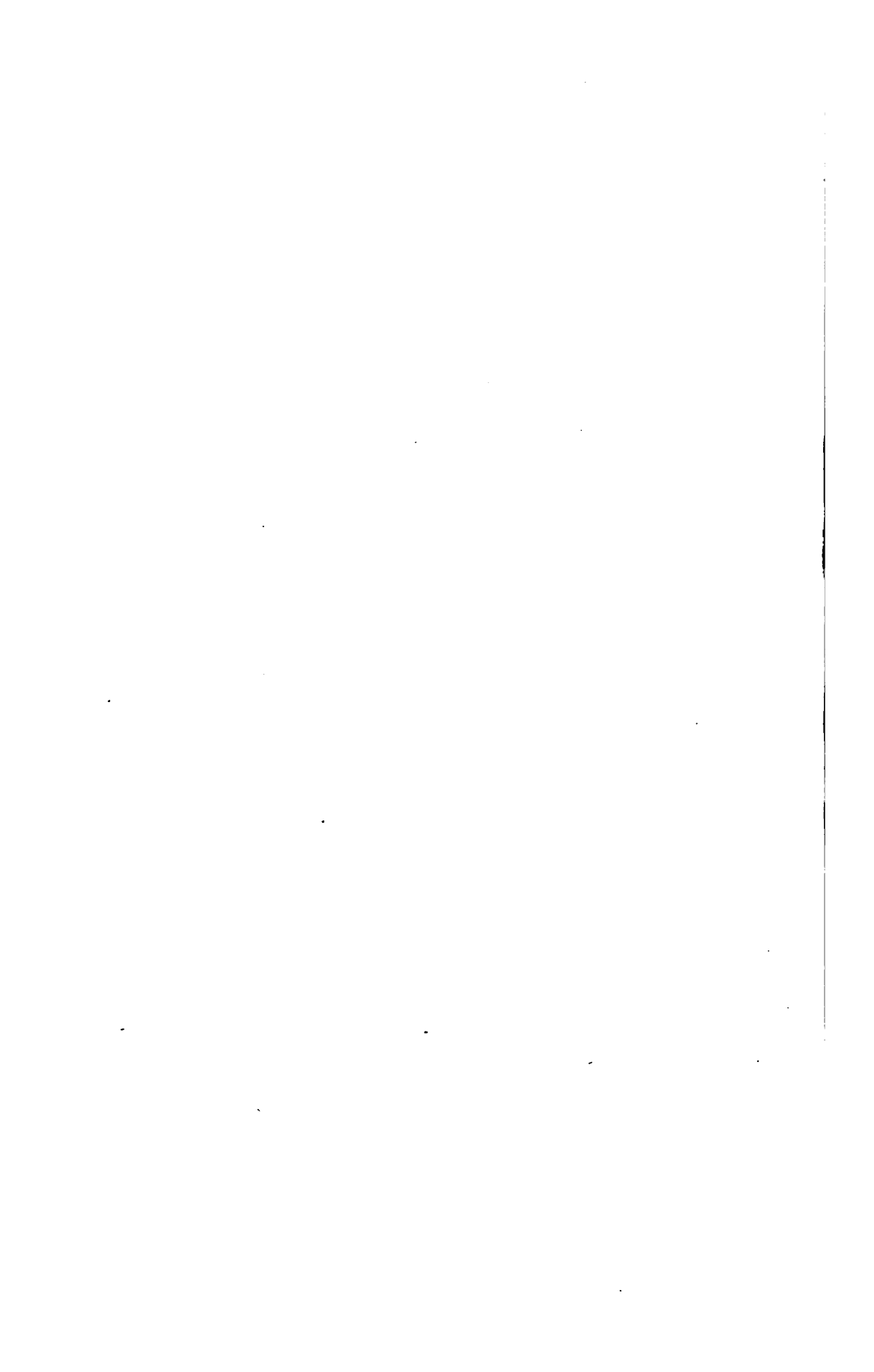
Resolved, That the Clerk of the Assembly be directed to prepare, for the use of the Legislature, a compilation of the majority and minority reports on contested elections to seats in the Assembly, and that he cause a sufficient number of the same to be printed and bound so that at least one copy thereof can be furnished to each member of the present House.

INTRODUCTION.

In compliance with the foregoing resolution of the Assembly this compilation has been prepared.

In many of the cases reported the complete proceedings, from the presentation of the petition to the final action of the House, have been collected for the purpose of furnishing precedents.

In most of the cases, the preliminary proceedings, the reports of the committees and the final action of the House only have been compiled. In all the cases full references have been made to the testimony, documents and proceedings, as such references were necessary to render the cases intelligible and valuable.



CASES OF CONTESTED ELECTIONS
TO
SEATS OF MEMBERS OF THE ASSEMBLY
OF THE
STATE OF NEW YORK.

Case of John Rowan and Elishamer Tozer.

COUNTY OF CHARLOTTE — PETITION PRESENTED.

ASSEMBLY CHAMBER,

POUGHKEEPSIE, Oct. 22d, 1778.

A petition of John Rowan, Esq., setting forth that at the late election of representatives for the county of Charlotte, the petitioner and Elishamer Tozer, Esq., a sitting member of this house, were candidates; that though there appeared on the poll lists a plurality of eleven votes in favor of Mr. Tozer, yet, that twenty-two persons, whose names are subjoined to the said petition, and a number of others who voted in favor of Mr. Tozer, were not qualified by law to vote for representatives in Assembly, and, therefore, praying for a scrutiny, was read.

Ordered, That the said petition be committed to the committee of privileges and elections.

Assembly Journal, 1778, page 19.

REPORT OF COMMITTEE.

WEDNESDAY, Oct. 28th, 1778.

Mr. Schoonmaker, from the committee of privileges and elections, reported. That in the controverted election of Elishamer Tozer,

Esq., and John Rowan, Esq., the parties being called in and the matters specified in the petition of the said John Rowan against the said Elishamer Tozer, the sitting member, referred to the said committee, being argued, and many matters alleged by the parties, of facts in the county of Charlotte, which, by reason of the great distance from hence, and the expense in bringing witnesses hither, they could not conveniently prove to the satisfaction of the said committee, both parties agreed that witnesses might be examined in the county of Charlotte; for that purpose, the said committee are, therefore, of opinion.

1. That a scrutiny be allowed in the controverted election aforesaid.

2. That the parties may have liberty of examining witnesses on oath, in the county of Charlotte, before any magistrate there, and transmit the depositions to this house at their next meeting.

3. That the petitioner or his agent deliver a list to the sitting member, or his agent, of the persons intended to be objected to by the petitioner, who voted for the sitting member, mentioning in the said list the several heads of objections, and distinguishing the same against the names of the voters excepted to, and that the sitting member or his agent deliver a like list to the petitioner or his agent.

Which report he read in his place and afterward delivered the same in, at the table where the same was again read, and agreed to by the house; thereupon,

Resolved, That a scrutiny be allowed in the said controverted election, before the House, at their next meeting.

Ordered, That the said parties do, on the second Tuesday of December, exchange such lists as are mentioned in said report.

Ordered, By consent of the parties, that the said parties or their agents have liberty to examine witnesses on oath, before Alexander Webster and Ebenezer Russell, Esqs., justices of the peace for the said county, or either of them, and that the depositions to be taken be transmitted to this House, at their next meeting, in writing, under the seal or seals of the person or persons taking the same.

Ordered, That such examinations be taken at the house of Ebenezer Clark, Esq., in the township of New Perth, in the said county, on the third Tuesday in December next, or so many next succeeding days as shall be necessary for that purpose.

Ordered, That the clerk of this House do serve the parties each with a copy of the above resolutions and orders.
Assembly Journal, 1778, page 26.

POUGHKEEPSIE, *Jan. 28th*, 1779.

A letter from Alexander Webster and Ebenezer Russell, Esqs., two of the justices of the peace for the county of Charlotte, to the Speaker, including several depositions relative to the controverted election between Elishamer Tozer and John Rowan, Esqs., was read.

Ordered, That the said letter and depositions be referred to the committee of privileges and elections
Assembly Journal, 1779, page 46.

FURTHER REPORT OF COMMITTEE.

February 2d, 1779.

Mr. Schoonmaker, from the committee of privileges and elections, to whom was referred the letter of Alexander Webster and Ebenezer Russell, Esqs., and the depositions therein enclosed, reported. That it will be proper for the House to take into consideration the said letter and depositions, when the House shall hold a scrutiny between Elishamer Tozer and John Rowan, Esqs. That the parties and several witnesses are now attending in this place, and, therefore, that the said scrutiny should be held as soon as the other public business will permit.

Resolved, That the House concur with their committee in said report.

Resolved, That this House will, to-morrow, hold a scrutiny in the controverted election, between Elishamer Tozer and John Rowan, Esqs., and

Ordered, That the clerk serve the parties with copies of the above resolution.

Assembly Journal, 1779, page 50.

JOHN ROWAN AT THE BAR OF THE HOUSE.

March 13th, 1779.

John Rowan, Esq., attending at the bar of the House, prayed that the House would proceed to hold a scrutiny in the controverted election between him and Elishamer Tozer, Esq., and the said Elishamer Tozer not being present in his seat,

Resolved, That inasmuch as John Rowan Esq., did not appear at the bar of this House on the 1st instant, pursuant to the order of this House of the 3d day of February last, that this House will not at present proceed to hold a scrutiny in the controverted election between the said John Rowan and Elishamer Tozer, Esq.;

Resolved, That the said parties have a further day given, until the first day of the next meeting of the Legislature, and that if the said Elishamer Tozer doth not appear on that day, that this House will proceed to hold a scrutiny in the said controverted election, *ex parte*, and that if the said John Rowan doth not punctually attend on that day, that he be foreclosed of his right to a seat in this House.

Case of Andries Bevier and Thomas Palmer.

ULSTER COUNTY — PETITION PRESENTED.

ASSEMBLY CHAMBER,

POUGHKEEPSIE, *November 5th, 1778.*

A petition of Jacob Conklin and seven other persons, inhabitants of the county of Ulster, was read setting forth that, at the late election for representative for the said county, Colonel Thomas Palmer was a candidate. That a number of votes were taken in the precinct of New Windsor for Captain Bevier, which, being added to the votes taken in the other parts of the county for

Captain Andries Bevier, will give the said Andries Bevier a plurality of votes. That several of the said persons who voted for Captain Bevier declare that they intended to vote for Adjutant Bevier, who they understood was made a captain, and not for Captain Andries Bevier. That if the votes of the said persons were taken from the number supposed to be for Captain Andries Bevier, that Colonel Palmer will then have a plurality. Wherefore the petitioners prayed a scrutiny in the said election between the said Thomas Palmer and Captain Andries Bevier.

Ordered, That the said petition be referred to the committee of privileges and elections.

Ordered, That the said committee inquire into the matters set forth in the said petition, during the recess of the Legislature. Assembly Journal, 1778, pages 40, 41.

REPORT OF COMMITTEE.

February 4th, 1779.

Mr. Schoonmaker, from the committee of privileges and elections, to whom was referred the petition of Jacob Conklin and seven other persons, inhabitants of the county of Ulster, presented to this House on the 5th day of November last, reported that, pursuant to an order of this House, the said committee had, during the recess of the Legislature, inquired into the matters set forth in the said petition. That upon such inquiry it appeared to the said committee that two of the persons who voted for Captain Bevier intended to have voted for Adjutant Bevier. That Captain Andries Bevier was present at such inquiry and insisted upon his right to a seat in this House. That, inasmuch as the petitioners pray that if the said Andries Bevier should notwithstanding claim his seat in this House, that the petitioners might have the benefit of a scrutiny in behalf of Colonel Thomas Palmer. The committee are, therefore, of opinion that a scrutiny should be granted in the controverted election between the said Andres Bevier and Thomas Palmer, which report heread in his place and delivered in at the table where the same was again read; thereupon,

Resolved, That a scrutiny be allowed in the said controverted election, between Andries Bevier and Thomas Palmer, Esqs., before this House, at the bar of the House, on the second Tuesday in March next, if the House shall then be sitting; but, if the House should be then adjourned, then on the second Tuesday in March.

Ordered, That the petitioners, Jacob Conklin and others, or one of them, or their agent, deliver to the said Andries Bevier, or his agent, on or before the 25th day of February, instant, a list of the persons intended to be objected to, who voted for the said Andries Bevier, mentioning in the said list the several heads of objections, and distinguishing the same against the names of the voters excepted to; and that Andries Bevier, Esq., or his agent, deliver a like list to one of the petitioners, or their agent, on or before the said twenty-fifth day of February, instant.

Ordered, That the clerk of this House transmit to the said Andries Bevier, Esq., a copy, and to the said petitioners, or one of them, another copy of the preceding report, resolution and order, by the first convenient conveyances.

Assembly Journal, 1779, page 52.

ANDRIES BEVIER AWARDED SEAT.

March 9th, 1779.

Andries Bevier, Esq., returned one of the representatives for the county of Ulster, attended pursuant to the order of this House of the 4th day of February last, in the controverted election between him and Colonel Thomas Palmer, and none of the petitioners on behalf of the said Thomas Palmer appearing, and the said Andries Bevier having produced a certificate from Egbert Dumond, Esq., sheriff of Ulster county, that the said Andries Bevier was one of those returned to him by the several supervisors and assessors, as duly elected a representative,

Ordered, That he be admitted to be sworn and take his seat.

Thereupon, the said Andries Bevier, Esq., having taken and subscribed the oath of allegiance, as by law prescribed, before the Speaker, as a commissioner appointed for the purpose, took his seat.

Assembly Journal, 1779, page 97.

**Case of the Seats of Sidney Berry and Andrew Mitchell, Members
from Saratoga County.**

PETITION PRESENTED.

ASSEMBLY CHAMBER,
CITY OF NEW YORK, *January 4th*, 1792.

A petition of Eliphalet Kellogg and others, freeholders and inhabitants of Ballston in the county of Saratoga, setting forth that the petitioners at the last election for members of said county voted for Beriah Palmer, Benjamin Rosekrans, Adam Comstock and Elias Palmer for member of Assembly, as by affidavit accompanying the said petition will appear; that the poll lists and ballots of the town of Ballston before the enclosures were broken and the ballots examined were burnt, by which means it was determined that Benjamin Rosekrans, Elias Palmer, Sidney Berry and Andrew Mitchell were chosen members of Assembly from the county; that they conceive the two latter would not have appeared to have been elected if the Ballston ballots had been canvassed, and the petitioners by the said petition pray that, after due examination of the affidavits presented on this subject, the House will admit those gentlemen to a seat who shall appear to have had the greatest number of votes.

A petition of the said Beriah Palmer, Esq., and a petition of the said Adam Comstock, Esq., on the same subject and respectively praying to be admitted to a seat in this House, were respectively read, together with several depositions which accompanied the said petitions.

Ordered, That the said several petitions and the depositions which accompany the same be committed to the committee on privileges and elections.

Assembly Journal, 1792, pages 4, 5.

REPORT OF COMMITTEE.

IN ASSEMBLY, *January 16th, 1792.*

Mr. Smith (of Suffolk county), from the committee of privileges and elections, to whom was referred the petition of Eliphalet Kellogg and others, and the separate petitions of Beriah Palmer and Adam Comstock, together with the depositions and papers which accompanied the same, reported the following facts, viz.: That on the last Tuesday in May last, John Bradstreet Schuyler, Benjamin Rosekrans and Elias Palmer, being a majority of the supervisors of Saratoga county, met, pursuant to law, to canvass the votes for members of Assembly for the said county. That among the bundles containing the poll lists and ballots, delivered to them by the clerk of the said county, there appeared two bundles from the town of Ballston, one of which was superscribed by Beriah Palmer as supervisor, and others, together with him, as inspectors of the election, held in the said town; and to the other, the names of James Gordon, as supervisor, and others, together with him, as inspectors of the election held in said town, were superscribed; and that each of the said bundles was inclosed, superscribed, sealed, and in every respect returned as the law directs. That the said Beriah Palmer and James Gordon appeared and claimed respectively a seat, as the legal supervisor of the said town. That on the first day of the meeting of the said supervisors, they proceeded to examine the votes or ballots of the town of Stillwater, and after having canvassed the same, they were burnt by one of the said supervisors without any particular direction for that purpose. That it was then agreed by a majority of the said three supervisors, that the ballots taken by the person who should be declared the supervisor of the town of Ballston, should be received and canvassed; but, upon a reconsideration of the question, it was determined by a majority of the said three supervisors that both bundles of the poll lists and ballots from the town of Ballston should be destroyed without being opened. That on the second day after the meeting of the said supervisors, and after it was determined to

destroy the poll lists and ballots from the town of Ballston, they proceeded to examine the claims of the said Beriah Palmer and James Gordon, and thereupon decided that the said Beriah Palmer was the legal supervisor of the said town of Ballston, but they did not admit the said Beriah Palmer as one of the said canvassers. That after Beriah Palmer was declared the supervisor of Ballston, the other three supervisors proceeded to canvass the ballots returned for the towns of Halfmoon and Saratoga. That after they had completed canvassing the same, the ballots and poll lists were thrown upon the table, together with the bundles of ballots and poll lists which had been returned from the town of Ballston, were destroyed, and were with those taken and burnt by the aforesaid John Bradstreet Schuyler, without any particular direction of the said supervisors for that purpose.

That after the poll lists and ballots from the town of Ballston were destroyed, the three aforesaid supervisors did sign the certificate of election.

And the committee further reported, that at the election held in Ballston, by the said Beriah Palmer as supervisor of the said town and one of the inspectors of the said election, there were taken three hundred and twenty-three ballots for members of Assembly, and at the election held by James Gordon, as supervisor of the said town and one of the inspectors of said election, there were taken two hundred and twenty-four ballots for members of Assembly.

That two hundred and nine persons have made oath that, at the last annual election held in Ballston by Beriah Palmer as supervisor, and others, inspectors of the said election, they voted for Beriah Palmer, Benjamin Rosekrans, Adam Comstock and Elias Palmer.

That, in the three towns of Stillwater, Saratoga and Halfmoon, Elias Palmer had three hundred and thirty votes; Benjamin Rosekrans, two hundred and twenty-two votes; Sidney Berry had two hundred and thirty-one votes; Andrew Mitchell had two hundred and twelve votes; Beriah Palmer had one hundred and seventy-three votes; and Adam Comstock, one hundred and forty-two votes.

Mr. Smith read the said report in his place, and delivered the same in at the table, where it was again read.

Ordered, That the said report be committed to a committee of the whole house, and that Thursday next be assigned for the consideration of the said report.

And on reading a petition of Beriah Palmer, praying to be heard, by himself or his counsel, on behalf of the petitioners, on the subject reported on;

Ordered, That the said Beriah Palmer be heard by himself or his counsel, at the bar of this House, on the subject-matter of the said report, and the petitioners therein mentioned, on Thursday next at twelve of the clock.

Assembly Journal, 1792, pages 23, 24.

REPORT CONSIDERED.

Beriah Palmer heard for the petitioners, at the bar of this House.

IN ASSEMBLY, *January 19, 1792.*

The order for the day was read, that Beriah Palmer, on behalf of the petitioners, be heard at the bar of this House, by himself or counsel, on the report of the committee of privileges and elections, on the petition of Eliphalet Kellogg and others, and the other petitions and papers mentioned in the said report, relative to the seats of two of the members from Saratoga county.

The said report, as inserted in the journal of this House of the 16th instant, was read, and John Cozins, Esq., of counsel for the petitioners, was heard at the bar of the House.

The House then resolved itself into a committee of the whole House, on the said report, and after some time spent thereon, Mr. Speaker resumed the chair, and Mr. Barker, from the said committee, reported that the committee had made progress therein and directed him to move for leave to sit again.

Ordered, That the said committee have leave to sit again.
Assembly Journal, 1792, page 29.

SEATS OF SIDNEY BERRY AND ANDREW MITCHELL VACATED.

January 20th, 1792.

Mr. Barker, from the committee of the whole House, on the report of the committee of privileges and elections on the petition of Eliphalet Kellogg and others, and the other petitions and papers mentioned in the said report, which report is inserted in the journal of this House of the 16th instant, reported that, after debates were had in the committee on the said report, Mr. Lewis made a motion that the committee should agree to a resolution in the words following, viz.:

Resolved, That it is the opinion of this committee that the seats of Sidney Berry and Andrew Mitchell, members attending this House from the county of Saratoga, be vacated. That the question having been put whether the committee had agreed to said resolution, it passed in the negative.

Mr. Barker read the report in his place, and delivered the same in at the table where it was again read and agreed to by the House. Assembly Journal, 1792, page 31.

Case of Michael Myers.

HERKIMER COUNTY — SEAT RETAINED — PETITION OF ELECTORS PRESENTED.

ASSEMBLY CHAMBER,

CITY OF NEW YORK, *Jan. 6th, 1792.*

A petition of Hugh White, Jedediah Sanger and Jones Platt, Esqs., on behalf of themselves and many of the electors of Herkimer county, was read, setting forth that at the meeting of the supervisors of said county, in May last, for the purpose of canvassing and estimating the votes for a member to represent the said county in Assembly, two affidavits were delivered to the supervisors, that one or more voter or voters, at the election in Whitestown, put their ballots into the election box with their

own hands, whereas they ought to have been delivered to one of the inspectors; that thereupon, the supervisor of the town of Herkimer, and the supervisor of the town of German Flats, refused to suffer the said votes to be opened or received, but declared that they should be destroyed. That the supervisors of the town of Whitestown insisted that the bundle of votes was legally returned to that board, and ought to be counted; that if the inspectors of that election had proceeded irregularly, they were punishable, but that the board of supervisors were not authorized to go into such inquiry; that the ballots taken in Whitestown were rejected and destroyed, without any other charge or pretence of irregularity whatsoever, and the election determined from the ballots of the towns of Herkimer and German Flats only; that it is a prevailing opinion in the county, that if the ballots of Whitestown had been counted, Michael Myers, Esq., would not have had a plurality of votes, and could not have been returned as a member in Assembly; that fearing the evil consequences of so dangerous a precedent, they humbly pray that the seat of the said Michael Myers, Esq., in this House, may be vacated. Several depositions referred to in the said petition were also read.

Ordered, That the said petition and the several depositions which accompany the same, be committed to the committee of privileges and elections.

Assembly Journal, 1792, pages 9, 10.

REPORT OF COMMITTEE.

January 27, 1792.

Mr. Smith, of Suffolk county, from the committee of privileges and elections, to whom were referred the petition of Hugh White, Jedediah Sanger and Jonas Platt, and the several depositions which accompanied the same, reported the following state of facts, viz.:

That on the last Tuesday of May last, John Porteous, Frederick Fox and Jedediah Sanger, being the whole of the supervisors of the

county of Herkimer, met, pursuant to law, to canvass and estimate the votes for a member to represent the said county in Assembly. That on the same day, the clerk of the said county delivered to the said supervisors the bundles of poll lists and ballots, from all the respective towns in the said county, and that all the said bundles of poll lists and ballots were folded up and subscribed and sealed as the law directs.

That it appears to the committee, by several depositions, that during the said canvass William Colbraith and Caleb Merrill were present at the election held at Whitestown, in the county of Herkimer, for a member to represent the said county in Assembly, and that they saw one or more persons who voted at the said election, held in Whitestown, put their ballots into the election box, without delivering the same to one of the inspectors of the said election, and that thereupon John Porteous and Frederick Fox, being a majority of the said supervisors, determined that the poll lists and ballots taken in Whitestown ought to be destroyed, and that the said bundles were accordingly destroyed by Jedediah Sanger, one of the said supervisors, without being examined. That after the said poll lists and ballots were destroyed, a majority of the said supervisors determined that Michael Myers was legally elected a member of Assembly from the county of Herkimer, and accordingly gave the said Michael Myers a certificate of his election.

A petition from Jonas Platt, praying to be heard, by counsel, at the bar of this House, on the last preceding report and the matters relating thereto was read; thereupon,

Ordered, That the petitioners be heard, by counsel, at the bar of this House, on Monday next, at 12 o'clock, on the last preceding report and matters relative to the same.

Assembly Journal, 1792, pages 40, 41.

MICHAEL MYERS RETAINS HIS SEAT.

January 30, 1792.

The order for the day was read, that the petitioners be heard by counsel at the bar of this House, on the report of the committee of

privileges and elections, on the petition of Hugh White and others, and the several depositions which accompanied the same, relative to the seat of Michael Myers, Esq., in this House, as a member from Herkimer county.

That said report as inserted in the Journal of this House, of the 27th instant, was read, and Jonas Platt, Esq., for himself, and of counsel for the other petitioners, was heard at the bar of the House.

The House then proceeded to the consideration of the said report, and the depositions on the subject thereby reported, and which were formerly read in the House, and also several depositions relative thereto, which were obtained by the committee of privileges and elections, were read and considered, and debates had thereon.

Mr. Havens then made a motion for a resolution, in the words following, viz.:

Resolved, That Michael Myers, Esq., returned as a member of this House, elected in the county of Herkimer, is not duly elected, and that therefore his seat be vacated.

The question being put, whether the House did concur in the said resolution, it passed in the negative.

Assembly Journal, 1792, pages 41, 42.

Case of Jonathan Fitch.

TIoga COUNTY — PETITION PRESENTED.

IN ASSEMBLY, *January 10, 1792.*

A memorial of Jonathan Fitch, a freeholder of Tioga county, relative to a seat in this House as a member, and a certificate of the supervisors of the same county of the number and state of the ballots by them canvassed on the last Tuesday in May last for a member in this House from the said county were respectively read and committed to the committee on privileges and elections.

Assembly Journal, 1792, page 13.

For further proceedings see Assembly Journal 1792, pages 21 and 29.

REPORT OF COMMITTEE.

IN ASSEMBLY, *January 16, 1792.*

Mr. Smith (of Suffolk county), from the committee on privileges and elections, to whom was referred the petition of Jonathan Fitch, and the certificates of the supervisors of the county of Tioga, reported the following state of facts, viz.:

That on the last Tuesday of May last the supervisors of the several towns of Chemung, Owego, Union, Chenango and Jerico, being the whole number of towns in the county of Tioga, met, pursuant to law, to canvass the votes for member of Assembly for the said county. That there being no county clerk in the said county the poll lists and ballots taken in each of said towns were delivered by the supervisors thereof to the board of supervisors. That the towns of Jerico, Chenango, Union and Chemung returned their poll lists and ballots bound up in every respect as the law directs. That upon canvassing the ballots from the said towns there appeared to be two hundred and eight votes for Bunton Paine, and one hundred and eighty-three votes for Jonathan Fitch, so that there was a majority of twenty-five votes in favor of Bunton Paine. That the ballots and poll list from the town of Owego were covered with a paper covering, but without being subscribed and sealed by the inspectors as the law directs, and put into a wooden box, which box was bound around with tape and sealed, and contained thirty-one ballots, which were all for Jonathan Fitch.

Ordered, That the said report be committed to a committee of the whole House.

Assembly Journal, 1792, pages 24, 25.

JONATHAN FITCH RETAINS HIS SEAT.

IN ASSEMBLY, *January 23, 1792.*

The House proceeded to the consideration of the resolution of the committee of the whole House of the 19th inst., on the report of

the committee of privileges and elections, on the petition of Jonathan Fitch and the certificate of the supervisors of Tioga county, the consideration whereof was on that day postponed.

The said resolution being again read is in the words following, viz.:

Resolved, That it is the opinion of this committee that Jonathan Fitch is entitled to a seat in this House as a member from the county of Tioga.

The said resolution being again read was concurred in by the House; thereupon,

Resolved, That Jonathan Fitch is entitled to a seat in this House as a member from the county of Tioga.

Assembly Journal, 1792, page 32.

Case of Nicholas Staats and Arent Van Dyck.

COUNTY OF RENSSELAER — NICHOLAS STAATS PRESENTS A
MEMORIAL.

STATE OF NEW YORK:

ASSEMBLY CHAMBER, IN THE CITY OF ALBANY,

Tuesday, January 25, 1803.

A memorial of Nicholas Staats of Rensselaer county, Esq., relative to his claim to a seat in this House, as a member from the said county, was read and referred to the committee on privileges and elections.

Assembly Journal, 1803, page 11.

REPORT OF COMMITTEE IN FAVOR OF NICHOLAS STAATS.

ASSEMBLY CHAMBER, *January 28, 1803.*

Mr. Peck, from the committee on privileges and elections, to whom was referred the memorial of Nicholas Staats, with the documents accompanying the same, reported: That the county of Rensselaer is, by law, entitled to five members of Assembly; that four

persons have been returned by the clerk of said county as duly elected; that it appears, by a certificate accompanying the memorial, that Nicholas Staats and Arent Van Dyck had each twelve hundred and seventy-one votes for member of Assembly of said county at the last election, which numbers were the next highest to the numbers for the persons elected; that at the said election in the town of Schodack, one William Shafer, then a resident of the town of Kinderhook, in the county of Columbia, voted for the said Arent Van Dyck for one of the members of the county of Rensselaer, and did not vote for the said Nicholas Staats, and in consequence thereof an equality of votes was produced and the county deprived of a member.

Your committee, from the preceding facts, are of opinion that the interposition of the House will be proper in this case, and that the said Nicholas Staats is entitled to a seat as one of the members of the county of Rensselaer; thereupon,

Resolved, That the consideration thereof be postponed until Tuesday next.

Assembly Journal, 1803, page 28.

REPORT NOT AGREED TO.

ASSEMBLY CHAMBER, *February 1, 1803.*

Then the House took into consideration the report of the committee of privileges and elections, on the memorial of Nicholas Staats of the county of Rensselaer, relative to his claim to a seat in this House as a member from the said county; thereupon,

Resolved, That this House do not agree with the said committee in their said report.

Assembly Journal, 1803, page 41.

Case of Amos Rathbun and Salmon Buel.

CAYUGA COUNTY — PETITION PRESENTED.

IN ASSEMBLY, *February 1, 1806.*

The memorial of Salmon Buel, of the county of Cayuga, praying for an inquiry into the legality of the election of Amos Rathbun, Esq., a member of this House, returned as duly elected for the county of Cayuga, was read and referred to the committee on privileges and elections.

Assembly Journal, 1806, page 36.

REPORT OF COMMITTEE IN FAVOR OF AMOS RATHBUN.

IN ASSEMBLY, *February 24, 1806.*

Mr. Van Vechten, from the committee of privileges and elections, to whom was referred the memorial of Salmon Buel, reported as follows, to wit:

That from the testimony exhibited before the committee, and which is herewith submitted, it appears that Peter Hughes, Esq., the clerk of Cayuga, did, after the return into his office of the votes for member of Assembly, taken at the last election in and for the county of Cayuga, make and estimate a statement of the said votes whereby it appeared that the memorialist had a greater number of votes for a member of Assembly than Amos Rathbun; that the said Peter Hughes did thereupon make out, in due form, and subscribe a certificate of election of the memorialist, as one of the members of Assembly for the said county during the present year, and delivered the same certificate to a person who resided in the same town with the memorialist to be handed to him; that immediately after such delivery of the said certificate, it was suggested to the said Peter Hughes, that the said Amos Rathbun had a greater number of votes in the town of Scipio, in the said county of Cayuga, at the said election, than had been allowed to him in the estimate and statement aforesaid, that the said Peter Hughes thereupon recalled his aforesaid certificate, before it had been delivered to the memorialist, and searched for the original return of the votes of the said

town which had been made into his office, and from which he had made the estimate and statement aforesaid, but could not then find it, nor has he been able to find it since; that the said Peter Hughes thereupon sent a messenger to the office of the town clerk in and for the said town of Scipio, for a certified copy of the returns of the aforesaid votes filed there, and that the said messenger returned the next day with such certified copy from the said town clerk and delivered the same to the said Peter Hughes, whereby it appeared that the said Amos Rathbun had three hundred and seventy-nine votes in the same town, and the memorialist two hundred and fifty-one votes; that the said number of three hundred and fifty-nine votes is right, or nine more than had been allowed to the said Amos Rathbun in the first estimate and statement aforesaid of the said Peter Hughes; that the said Peter Hughes thereupon made a new estimate and statement of the votes taken at the said election for member of Assembly, whereby it appeared that the said Amos Rathbun had one vote more than the memorialist; that the said Peter Hughes, being, as he deposes, convinced that his said first estimate and statement was erroneous, and that the last was correct, did accordingly alter and rectify his record of the said votes taken at the said election, and did make out and deliver a certificate to the said Amos Rathbun, of his election; that the certified copy of the return so as aforesaid obtained by the said Peter Hughes, from the office of the said town clerk of Scipio, was sent for before, but not received by him until after the time limited by law for the return of the aforesaid votes into the office of the clerk of the said county; that it also appears from the affidavits of Jonathan Richmond and Abijah Capon, marked number one and four, herewith submitted, that at the canvass of the ballots taken for member of Assembly, in the said town of Scipio, at the aforesaid election, a particular ballot, in the same affidavits described, was rejected by the canvassers, and that had the said ballot been canvassed and the vote returned in favor of the memorialist, he would, according to the last estimate and statement aforesaid of the said Peter Hughes, have had an

equal number of votes with the said Amos Rathbun; that for further particulars respecting the true state of the votes taken in and for the said town of Scipio, at the aforesaid election for member of Assembly, and the conduct and proceedings of the said Peter Hughes in the premises, your committee beg leave to refer to the affidavits of the aforesaid Jonathan Richmond and Abijah Capon, marked number two and three, and of Samuel Chidfey, James Stancliff, John Groan and the said Peter Hughes, marked number one, two, three and four, herewith also submitted; that upon the facts herein above set forth, and which are stated in the affidavits above referred to, your committee are of opinion that the said Amos Rathbun is entitled to retain his seat as a member of this House from the county of Cayuga.

Ordered, That the consideration of the said report be postponed until to-morrow.

Assembly Journal, 1806, pages 146, 147.

AMOS RATHBUN AWARDED THE SEAT.

IN ASSEMBLY, *February 25, 1806.*

The House then took into consideration the report of the committee of privileges and elections on the memorial of Salmon Buel; thereupon,

Resolved, That the House do agree with the committee in their said report.

Assembly Journal, 1806, page 152.

Case of William Ramsey and Amos Hall.

COUNTIES OF ONTARIO AND GENESEE, 1808.

[For petition of William Ramsey, see Assembly Journal, 1808, page 10.]

REPORT OF COMMITTEE — WILLIAM RAMSEY AWARDED SEAT.

IN ASSEMBLY, *January 29, 1808.*

Mr. S. Miller, from the committee of privileges and elections, to whom was referred the memorial of William Ramsey, of the

county of Genesee, praying that the seat of Amos Hall, as a member of this House from the counties of Ontario and Genesee, may be vacated and that the momorialist might be admitted thereto, reported: That by the act of the Legislature of the State of New York, entitled "An act for regulating elections," it is declared that the last Tuesday of April in every year shall be the anniversary day on which the election of members of Assembly shall be held; and that the same shall be continued by adjournment from day to day for three days successively, including the first.

That it appeared to the committee, from the certificate of Sylvester Tiffany, clerk of the county of Ontario, exemplified under the seal of said county, and dated January 18, 1808; that by the aggregate of votes for member of Assembly taken and returned at the election in the year 1807, estimating those taken in Hartford in said county. Amos Hall had the number of two thousand two hunderd and twenty-three votes.

That it further appeared, both by the affidavits of George W. Jones and Joshua Lovejoy, and from the certificate of the said clerk, under the seal of the county, of the date aforesaid, that the poll of the election in the town of Hartford, in said county, was kept open and votes received on four days, to wit: on the 28th, 29th and 30th days of April and on the first day of May in the year aforesaid.

That at the said poll in the town of Hartford one hundred and sixty-nine votes were taken and canvassed for the said Amos Hall for member of Assembly, and that thirty-one votes were taken and canvassed for the said William Ramsey for member of Assembly.

And inasmuch as it appeared from the said certificates that the poll of election in the town of Hartford was kept open, and votes received and canvassed contrary to the direction of the said act, and that after deducting the votes so illegally taken and canvassed, from those given to the said Amos Hall and William Ramsey, respectively, at the said election in the said counties, the number of votes for the said Amos Hall would be two thousand and fifty-six,

and the number of votes for the said William Ramsey two thousand one hundred and seventy-two; consequently the greater number, or majority of the votes legally given and canvassed would be for the said William Ramsey.

The committee were therefore of the opinion that the seat of the said Amos Hall should be vacated; and that William Ramsey, the memorialist, was entitled to his seat as a member of this honorable House, for the said counties of Ontario and Genesee.

Resolved, That the House do agree with the committee in their report.

Resolved, That the seat of Amos Hall as a member of this House from the counties of Ontario and Genesee be vacated; and that William Ramsey be permitted to take the oaths prescribed by law, and to take his seat as a member of this House from said counties.

Mr. Ramsey appeared in the Assembly Chamber, was duly qualified, and took his seat.

Assembly Journal, 1808, page 35.

Case of Joshua Forman and Jonathan Stanley.

COUNTY OF ONONDAGA — PETITION PRESENTED.

IN ASSEMBLY, *February 1, 1808.*

The memorial of Jonathan Stanley, Jr., praying that the seat of Joshua Forman, as a member of this House from the county of Onondaga, be vacated, and that the memorialist may be admitted thereto as a member from the said county, was read, and with the papers and documents accompanying the same, referred to the committee of privileges and elections.

Assembly Journal, 1808, page 44.

REPORT OF COMMITTEE — JOSHUA FORMAN RETAINS HIS SEAT.

February 6, 1808.

Mr. S. Miller, from the committee of privileges and elections, to whom was referred the petition of Jonathan Stanley, Jr., of the

county of Onondaga, praying that the seat of Joshua Forman, now a member of this House from the county of Onondaga, be vacated, and the memorialist admitted thereto in his stead, reported. That it appears by the affidavits of Joseph Ely and five other electors of said county, that the votes given for Jonathan Stanley by them and several others, whose tickets some of them had prepared, were intended for the memorialist, Jonathan Stanley, Jr., and that the same facts substantially appear by the certificates given by the inspectors of the towns of Cincinnatus, Pompey, Camillus, Manlius and Virgil, in said county. That by the certificate of John Miller and James Petit, physicians, residing in the town of Fabius, in said county, it appears that Jonathan Stanley resides in said town of Fabius, and is between seventy and eighty years of age; that he is infirm and wholly unfit for any kind of business, and not generally known in said county, and could not have been considered as a candidate for member of Assembly at the last election. That it further appears from the certificate of Jasper Hopper, clerk of the county of Onondaga, that in the spelling of the names "Forman," "McWhorter" and Stanley there was an immaterial difference that the votes returned from the town of Virgil, for Joshua Forman, by the inspectors of the said town, as the number given to him were "six—two," and that the same were considered by the said clerk as intended for and admitted as sixty-two.

From a consideration of these facts, your committee are of opinion that although it was evidently the intention of a sufficient number of electors in said county to give their votes for the said Jonathan Stanley, Jr., which, if correctly given, would have entitled him to his seat in this House, to the exclusion of the said Joshua Forman; yet, it would be manifestly improper to suffer electors or any other person for them to contradict the expression of their sentiments, manifested by the result of a legal canvass.

And, although the canvass of the votes of the town of Virgil was returned by the inspectors of said town, is six—two, yet, the presumption is so strong, that same ought to be certified and returned

as sixty-two, that your committee cannot but believe that such was the real number of votes given in the said town for Joshua Forman, and that such ought to have been the return thereof.

This presumption is rendered more certain from the facts of the other candidates for members of Assembly having nearly the same number of votes in said town, and by allowing the votes as sixty-two, which were returned as six—two, it seems to follow irresistibly that the return was an oversight in the inspectors, and a palpable mistake.

Your committee are, therefore, of opinion, that the prayers of the memorialist be denied.

PRAYER OF PETITIONER, JONATHAN STANLEY, DENIED.

Resolved, That this House agree to the preceding report of their committee.

Assembly Journal, 1808, pages 63, 64.

Case of William Hunter.

JEFFERSON COUNTY — PETITION PRESENTED.

January 31, 1811.

The petition of William Hunter, of the county of Jefferson, stating that at the last general election he received a majority of the votes given at the said election for a member of Assembly from said county, and that in consequence of a mistake in the spelling of his name on some of the ballots given at said election he has not been able to procure from the clerk of said county a certificate of his said election, and praying to be admitted to take his seat in this House as a member thereof, was read and together with the documents accompanying the same referred to the committee of privileges and elections.

Assembly Journal, 1811, page 18.

REPORT OF COMMITTEE.

February 2, 1811.

Mr. Sargent, from the committee on privileges and elections, to whom was referred the petition of Wm. Hunter, reported as follows viz.:

That it appears by a certified copy of the returns of votes taken for representatives in Assembly in the several towns in the county of Jefferson that Ethel Bronson had in the said several towns, one thousand one hundred and thirty-six votes; Corlis Hinds had one thousand two hundred and four votes; William Hunter had one thousand one hundred and twelve and Wm. Hunter had ninety-nine votes; which said ninety-nine votes given to Wm. Hunter the committee are of opinion were given or intended for William Hunter inasmuch as that Wm. appears to the committee to be a uniform abbreviation of the name William; and as the adding of the said votes given to Wm. Hunter to those given to William Hunter will give the said William Hunter a larger number of votes than either of the other candidates, the committee are therefore of opinion that the said William Hunter was duly elected as a representative from the county of Jefferson and ought to be allowed to take his seat in this House.

Ordered, That the consideration of the said report be postponed until Monday next.

Assembly Journal, 1811, page 28.

WILLIAM HUNTER AWARDED THE SEAT.

February 4, 1811.

The House then took into consideration the report of the committee of privileges and elections on the petition of Wm. Hunter, of the county of Jefferson, and the said report being again read and considered; thereupon,

Resolved, That this House do concur with the committee in their said report.

Assembly Journal, 1811, pages 30, 31.

Case of Joseph C. Field and others.

DUTCHESS COUNTY — PETITION PRESENTED.

IN ASSEMBLY, *February 7, 1811.*

The petition of Joseph C. Field and others, inhabitants of the county of Dutchess, representing that at the last general election, they were candidates for members of Assembly for said county, and alleging that the inspectors of said election for the town of Beekman were guilty of misconduct and malpractices, and praying that the votes of said town may be set aside and rejected, and that they may be admitted to take their seats in this House as members thereof, was read, and, together with the documents accompanying the same, referred to the committee of privileges and elections.

Assembly Journal, 1811, page 45.

For further proceedings see pages 52, 77, 126, 159 and 181.

RIGHT TO SEAT DENIED — REPORT OF COMMITTEE.

March 28, 1811.

Mr. Sargent, from the committee of privileges and elections, to whom was referred the petition of Joseph C. Field and others, reported as follows, to wit:

That the petitioners state in their petition that they were candidates for members of Assembly of this State, at the last anniversary election in the county of Dutchess, and as such were balloted for at the said election. And that Samuel A. Barker, Lemuel Clift, Isaac Van Wyck, Koert Dubois, Alexander Neely and Shadrack Sherman were also candidates aforesaid, at the said election in the said county of Dutchess, and were also balloted for as such members. Your committee state that it appears by the return of the inspectors of the election of the town of Beekman in said county, that in that town the said Samuel A. Barker, Lemuel Clift, Isaac Van Wyck, Koert Dubois, Alexander Neely and Shadrack Sherman had each four hundred and forty-three votes, and the petitioners had each

seventy-eight votes, making in the said town of Beekman a majority of three hundred and sixty-five votes. And it further appears to your committee that, by the return of all the votes taken in the said county of Dutchess at the last anniversary election for members of Assembly of this State, the above named persons had a majority over the petitioners of one hundred and forty votes in said county. And the said petitioners have further represented that, in consequence of the corrupt and improper conduct of the inspectors of the election of the town of Beekman, in said county, in conducting the said election, the votes taken in that town ought to be set aside and not taken into the canvass of said county, to establish which, the petitioners have exhibited numerous affidavits and documents and much contradictory evidence is presented; that the weight of evidence appears evidently to your committee to establish the fact of imprudent and mistaken conduct on the part of the said inspectors in the town of Beekman in said county at the last anniversary election. Your committee are, nevertheless, of opinion that it is against the sound policy of the election law to defeat the right of suffrage of any citizen, when honestly and fairly exercised; and, inasmuch as it does not appear to your committee that one hundred and forty votes were improperly received in the said town, admitting the evidence on the part of the petitioners to be true, it follows as a necessary consequence that the said Samuel A. Barker, Lemuel Clift, Isaac Van Wyck, Koert Dubois, Alexander Neely and Shadrack Sherman had a majority of all the votes given in the said county at the last anniversary election for members of the Assembly, by those persons who exercised the right of suffrage fairly and honestly. Your committee are further of opinion that the facts stated by the petitioners, if proven (without contradiction), ought not to vacate the seats of the members returned, and have, therefore, thought it their duty to decline a further examination of the truth of these facts. That, as to the corruption with which the inspectors of the election of the town of Beekman are charged by the petitioners, it appears to your committee to be a subject proper only for investiga-

tion in a court of law. Your committee are, therefore, of opinion that the prayer of the petitioners ought not to be granted.

Resolved, That this House do agree with the committee in their said report.

Assembly Journal, 1811, pages 338, 339.

Case of Richard Connor.

RICHMOND COUNTY — AFFIDAVITS PRESENTED.

IN ASSEMBLY, *February 22*, 1811.

Sundry affidavits relative to the last anniversary election in the county of Richmond were received and referred to the committee of privileges and elections, to whom was referred the memorial of Richard Connor.

Assembly Journal, 1811, page 137.

REPORT OF COMMITTEE.

March 5, 1811.

Mr. Sargent, from the committee on privileges and elections, to whom were referred the memorial documents and papers relative to the claim of Richard Connor to a seat in this House as a member from the county of Richmond, reported as follows, to wit:

That they have given the testimony submitted to their consideration a full examination. They find such contradictory testimony as to the legal conduct of the inspectors of the town of Westfield, and in other towns in the said county. They have not, therefore, considered themselves warranted in giving a decisive opinion on these subjects.

As to another subject of complaint, however, your committee deem it their duty to report the following facts. It appears by the official certificate of the late clerk of said county (in which he particularly set forth the returns of the respective towns in said county of the last annual election held therein for members of Assembly, as the same remains of record) that James Guyon, Jr., had, in the

town of Westfield, forty-nine votes, and Richard Connor had one hundred and twenty-one votes. The return of this town is contested.

By the act regulating elections, passed the 24th day of March, 1801, the inspectors having canvassed the votes shall set down the names of every candidate, with the number of votes given to each in words at full length, and shall certify the same, and shall deliver such certificate to the clerk of the county, to be by him entered of record. That immediately after subscribing such certificate or statement the inspectors shall destroy the poll books and ballots. It is concluded that that part of the inspectors duty was performed.

There is no evidence other than what has been stated that any of the inspectors kept any tally or account of the canvass whatever.

It manifestly appears to your committee that the certificate was made out and delivered to the clerk before the pretended mistake was discovered, and that such discovery was made on the memory of persons who were not officially connected with the board. Your committee do not, under all the circumstances of the case, hesitate to give it as their decided opinion that to admit the legality of the second return would be introducing a principle (which if not against law) is at once loose and dangerous to a fair and impartial administration of the rights of suffrage. They think, therefore, that the prayer of the petitioner ought not to be granted.

Ordered, That the said report, together with the memorial and documents relating thereto, be referred to a committee of the whole House.

Assembly Journal, 1811, pages 204, 205, 206.

For testimony see Assembly Journal, 1811, pages 204, 205.

For further proceedings, see Assembly Journal, 1811, pages 289 and 294.

COMMITTEE OF THE WHOLE.

March 21, 1811.

The House resolved itself into a committee of the whole on the report of the committee of privileges and elections, on the memorial

of Richard Connor, and after some time spent thereon, Mr. Speaker resumed the chair, and Mr. Huntington, from the said committee, reported that in proceeding on the said report, Mr. Grosvenor made a motion that the committee should non-concur in the said report.

That debates were had thereon, and the question being put, it passed in the negative.

That Mr. Baker then made a motion that the committee should concur in the said report, which he was directed to present to the House, and he read the report in his place and delivered the same in, at the table, where it was again read and agreed to by the House; thereupon,

RICHARD CONNOR DENIED THE SEAT.

Resolved, That this House do concur in the said report of the committee of privileges and elections.

Assembly Journal, 1811, pages 299, 300.

Case of John White and John Richards.

COUNTIES OF WASHINGTON AND WARREN — PETITION PRESENTED.

IN ASSEMBLY, *January 28, 1814.*

The memorial of John White, of the county of Washington, praying to be admitted to a seat as a member of this House, duly elected in the said county of Washington, in the room of Mr. Richards, the sitting member, was read, and referred to the committee of privileges and elections.

Assembly Journal, 1814, page 22.

REPORT OF COMMITTEE.

February 10, 1814.

Mr. Van Rensselaer, from the committee of privileges and elections, to whom was referred the petition of John White, and the documents accompanying the same, praying that he may be permitted to take his seat as a member of this House, reported:

That it appears by the affidavits of John McDonald, one of the inspectors of election of the town of Athol, in the county of Warren, Benoni Aldrich, Stephen Moon, James Dow and Stoakes Potter, that Duncan Cameron, John McDonald, John Cameron, Holden Kenyon and William Johnson were the inspectors of the last anniversary election in the said town; that the latter attended only the first day; that the said Duncan Cameron, John McDonald and John Cameron did not vote at the said election, because as they believe, they were severally aliens, and that the said board did decide that working on the highway alone was a sufficient qualification to entitle a man to vote, and that they did receive votes according to that decision. It further appears by the affidavit of the said John McDonald, that he was an alien, and that Duncan Cameron declared in his hearing, "that he could not take the oath if challenged." By the affidavits of John Murray and James Cameron, it appears that the four first-named inspectors acted as such on the last day of election, and that Duncan Cameron, John McDonald and John Cameron did not vote at that election, believing themselves aliens, as they severally declared in the hearing of the deponents that they were born in Europe, and James Cameron knows that John Cameron was born in Europe.

By the affidavit of Benoni Aldrich, it further appears that the said inspectors refused to administer the oaths, prescribed by law, to one William Scripture, who was challenged by a person duly qualified to vote at the said election, declaring that they had decided that working on the highway alone constituted a qualification to vote, and that if there was ever so much challenging, if they knew of any body being taxed or working on the highway, he should vote without being sworn, declaring that the board would be their own judges. It is proved by the certificates of John Beebe, clerk of the county of Warren, that the said Duncan Cameron and John McDonald were naturalized at a court of common pleas, held in and for the said county, on September 14th last. It also appeared on the examination of John McDonald, who was one of the inspectors

of the town of Athol, that he was born in Scotland, came to this country about the year 1774 or 1775, with the family of his father, being then an infant, and settled in the county of Delaware; that his father shortly after (about the commencement of the revolutionary war), left his family and went to Canada, where he remained the greater part of the war.

The board of inspectors decided that a mere residence for six months within the town, and working on highways within the county, were sufficient qualifications to entitle persons to vote, and that one or more persons were on such qualification allowed to vote. It further appeared by the examination of Duncan Cameron, also one of the inspectors of the town of Athol, that he emigrated to this State from the place of his nativity, North Britain, in the year 1785, and was naturalized in September last; was about ten years old at the time of his arrival here; does not know that his father was ever naturalized; confirms the testimony of John W. McDonald, and adds, that no person who had been challenged was permitted to vote by them, without being sworn, or the challenge withdrawn. It further appeared from the examination of John McDonald, one of the inspectors of the town of Athol, that he was born in Scotland; that he emigrated to this country in 1785, and was naturalized in the month of January last past; he confirms the statement of the two last preceding witnesses as to the decision of the board in regard to the qualification of voters.

It is proved to your committee, by Archibald Noble, of Johnsburgh, in the said county of Warren, that John Richards, Henry Allen, Wm. Leach, Morris Hopkins and himself, were the inspectors of the election in the said town in April last, and that he himself was an alien, having been born in Ireland, and from his testimony and the certificate of the aforesaid John Beebe, it is further proved that he has since been naturalized, and from the testimony of Morris Hopkins, one of the said inspectors of the said election, it appears that he was not a freeholder, as the only real estate he possessed or held, either in his own or his wife's right, was under a

lease of twenty-one years, with a covenant that if the consideration money was paid within that period, he should be entitled to a conveyance in fee, and by the affidavit of Henry Allen, another of the said inspectors, it appears that he owns a freehold in the town of Bethlehem, in the county of Albany, and possesses a farm in Johnsburgh, under a lease granted by John Thurman, for twenty years, with liberty to purchase the fee within that time.

It was further proved, on the examination of John Morse, one of the inspectors of the town of Kingsbury, that shortly after the last annual meeting the inspectors of that town met and agreed that the poll should be held on the first day of the then ensuing anniversary election for members of Assembly, and the other officers then to be elected, at the dwelling-house of the widow Clark, on the second day thereof at William Colvin's, and on the third or last day at Alpheus Doty's, and they then authorized Nathaniel Pitcher, also one of the inspectors, to put up the notices pursuant to such determination, which was accordingly done, as he afterwards saw one of them; that the election was not held on the said first day at the dwelling-house of the said widow Clark, but was opened at the house of John Stewart, at a distance of between a half and three-quarters of a mile from her residence; that he never knew of any second or other meeting of the said inspectors for the purpose of altering the notice first published, nor did he, to the best of his knowledge, consent to the alteration of the place, nor know that it was to happen till on the first day of the election; that he lives near the said Pitcher, in the village of Sandy Hill. This witness added that, in his opinion, the place of holding the election on the first day produced no difference in the result of the election of that town, and said that the change of place was owing to sickness in Mrs. Clark's family.

It appears from the affidavits of several persons, that the said election was advertised by the inspectors thereof to be held on the first day at the widow Clark's, but that it was not there held, but at the house of John Stewart; and William Colvin, one of the inspectors, swears that the reason of not opening the poll at the house of

widow Clark was the sickness of some of the family, and the notices first up were not altered, nor were any new notices put up altering the place of holding the election on the first day, nor were the old ones altered, according to the knowledge or belief of the deponent, and that the notice put up at the house of William Colvin, one of the inspectors, was not altered. Arad Sprague swears that the facts stated by William Colvin are true to his belief.

By the affidavit of Nathaniel Pitcher it appears that the notices were prepared and put up as sworn to by the other witnesses, that the poll was not held at Mrs. Clark's but at John Stewart's on the first day; it further appears, by the same affidavit, that at least two weeks before election he informed a majority of the inspectors of the sickness of Mrs. Clark's family, and that she could not permit the election to be held at her house, and that the majority did consent and agree that the election should be held at her house, and that the majority did consent and agree that the election should be held at Mr. Stewart's, being within sight and within a few rods distant from Mrs. Clark's, that he drew the advertisements accordingly, and posted up three of them himself at public places in Kingsbury, and that he was informed and verily believes that at least three others were posted at other public places in the town, that he has heard of only one person being disappointed in the place of holding the election, and that was William Colvin, one of the inspectors; that, in his opinion, the electors were fully apprised of the place of holding the first day as at any former election; that he has no doubt that the place where the election was held was advertised in at least five public places in the town, and at least eight days before the election. James Nichols, as one of the inspectors, confirms the affidavit of Nathaniel Pitcher, and Felix Alden, another of the inspectors of the town of Kingsbury, testifies that after the advertisements were put up directing the election to be held at Mrs. Clark's, Nathaniel Pitcher informed him of the sickness of her family, and requested his permission to change it to Col. Stewart's, that he assented to the alteration, and has understood and believes that the

election was notified accordingly more than eight days before the election, that the distance between Mrs. Clark's and Col. Stewart's is about half a mile, and that he did not hear of any objection at the election to the place of holding the same.

It appears from the affidavit of George Marshall, made on the seventh day of February instant, that some time in the course of the last week, he was present at a conversation between Nathaniel Pitcher, with some other gentlemen, on the subject of the last anniversary election, and that the conclusion which he drew from the conversation of the said Pitcher was, that the alterations in the notices of the said election were made only two or three days before the said election.

It further appears by the affidavit of Abraham L. Vandenberg, that at the said election a notice was put up at Stephen Ashley's tavern, stating that the election on the first day would be held at Mrs. Clark's; that three or four days before the election, he observed a notice attached to the original notice, stating that the election on that day would be held at the dwelling-house of John Stewart, on the first day thereof; that he boarded with Ashley at the time, and would have observed the alteration before the time if it had been made, and he further says that it is his impression, and he verily believes that the alteration was not made as the law directs.

From these statements, it appears that if this House shall vacate the election in either of the towns in which irregularities are complained of, the seat of John Richards must be vacated, and the petitioner, John White, admitted.

Your committee cannot omit, on this occasion, expressing their conviction, that on the purity of our election depends the preservation of our essential rights and privileges. That a rigid compliance with all the requisites of the election law is necessary to preserve that purity; that a participation in the elective franchise, by aliens, and more particularly by alien enemies, would establish a principle which, in its operation, might be highly dangerous to the vital existence of that franchise; that a participation in the offices of

government, by such aliens, is opposed to the principle and practice of every free and independent government.

Your committee consider the testimony as affording conclusive evidence of the fact of alienism of two, if not three, of the inspectors of election in the town of Athol. They are unanimously of opinion that the election in the said town was therefore an absolute nullity; that of course the seat of John Richards, Esq., should be vacated, and the petitioner be admitted as a member of this House.

Ordered, That the said report be committed to a committee of the whole House.

Assembly Journal, 1814, pages 80, 91, 92, 93.

For further proceedings, see Assembly Journal, 1814, pages 123 and 148.

SEAT AWARDED TO JOHN WHITE.

February 17, 1814.

The House resolved itself into a committee of the whole, on the report of the committee of privileges and elections, on the petition of John White, claiming his seat as a member of this House, duly elected in the counties of Washington and Warren, and after some time spent thereon, Mr. Speaker resumed the chair, and Mr. E. W. King, from the said committee, reported, that in proceeding on the said report, and after the same had been read in the committee, Mr. E. Williams made a motion that the committee should agree to a resolution, which was read, and is in the words following, viz.:

Resolved, As the sense of this committee, that John White ought to be permitted to take his seat as a member of the House of Assembly duly elected in the counties of Washington and Warren, in the room of John Richards, the sitting member, and the seat of the said John Richards ought to be accordingly vacated.

The Speaker put the question, and it was carried in the affirmative; thereupon,

Resolved, That John White be permitted to take his seat as a member of this House, duly elected in the counties of Washington

and Warren, in the room of John Richards, the sitting member, whose seat is hereby declared vacant.

Assembly Journal, 1814, pages 150, 151.

Case of Henry Fellows and Peter Allen.

ONTARIO COUNTY.

IN ASSEMBLY, *January 31, 1816.*

Petition of Henry Fellows presented.

Assembly Journal, 1816, page 7.

See for other proceedings, motions, &c., pages 7, 8, 10.

See also as to question of doing important business before contested seat is settled, and for various votes and motions, pages 38 to 47.

REPORT OF COMMITTEE — HENRY FELLOWS AWARDED THE SEAT.

IN ASSEMBLY, *February 7, 1816.*

Mr. H. Lee, from the committee of privileges and elections, to whom was referred the petition of Henry Fellows, with the documents accompanying the same, reported:

That the committee have investigated the claim of Mr. Fellows to be admitted to his seat as a member of this House, in the place of Peter Allen who was returned by the clerk of the county of Ontario as duly elected; that Mr. Allen and Mr. Fellows, according to notice given to that effect, appeared before the committee to enforce their respective claims; that from the documents referred to the committee the following facts are fully and clearly proven, and were not contradicted or denied by Mr. Allen.

That at the last anniversary election of member of Assembly in the town of Perrington, in the county of Ontario, forty-nine votes were given for Henry Fellows, by his name printed at full length; that the votes were duly canvassed by the inspectors of election, and duplicate certificates made according to the act, one of which was filed in the clerk's office of that town, in which the name of Henry Fellows was written at full length; but in the certificate made by

the said inspectors and filed in the clerk's office of the county of Ontario, the Christian name of the said Henry Fellows was written with the abbreviation of *Hen.* Fellows; that in calculating and ascertaining the number of votes given for the said Henry Fellows the clerk of the said county of Ontario refused to allow him those given in the said town of Perrington for Henry Fellows and returned to him by the name of *Hen.* Fellows, and determined that Peter Allen was elected and gave him his certificate accordingly.

The committee further report, that the whole number of votes given at the said election in and for the county of Ontario for Peter Allen was three thousand six hundred and ninety-five, and for Henry Fellows, including those given for him by that name in the town of Perrington, three thousand seven hundred and twenty-five. The committee are, therefore, unanimously of opinion that the seat of Peter Allen, Esquire, should be vacated, and the petitioner be admitted as a member of this House.

Resolved, That the House do agree with the committee in their said report.

Thereupon Mr. H. Lee made a motion that the House should agree to a resolution which was read in the words following, to wit:

Resolved, That Henry Fellows ought to be permitted to take his seat as a member of the House of Assembly, duly elected in the county of Ontario, in the room of Peter Allen, the sitting member, and that the seat of the said Peter Allen, the sitting member, be vacated accordingly.

Mr. Speaker put the question whether the House would agree thereto, and it was determined in the affirmative.

The ayes and noes were called for by Mr. Van Rensselaer and seconded by Mr. Duer, and were as follows, to wit:

For affirmative, 115.

For negative, 1.

Mr. Fellows appeared in the Assembly Chamber was qualified, and took his seat.

Assembly Journal, 1816, pages 51, 52, 53.

See as to question whether Peter Allen had a right to vote, &c., pages 83, 84 and 85, and 88 to 99.

RESOLUTIONS ADOPTED RELATIVE TO RIGHT OF PETER ALLEN TO VOTE, AND OTHER QUESTIONS OF REGULARITY, AND QUESTIONS OF ORDER, &C.

IN ASSEMBLY, *February 15, 1816.*

In farther considering the said resolutions with recitals, the same having been amended, were read in the words following, to wit:

Whereas, On the thirty-first day of January last, a petition was presented to this House from Henry Fellows, of the county of Ontario, claiming a right to a seat in this House as a member elected in the county of Ontario, in the place of Peter Allen to whom, as the petition alleged, a certificate had been improperly granted by the clerk of that county; and,

Whereas, It was thereupon moved that the reading of the said petition, and the documents accompanying the same, should be postponed until the next day; and,

Whereas, The said resolution was objected to as not being in order; and,

Whereas, The Speaker decided that the said motion was in order; and,

Whereas, The said decision of the Speaker was appealed from; and,

Whereas, A motion was made that the said Peter Allen should be omitted in calling of the division on the said appeal, upon the ground of his not being entitled to vote on a question collaterally affecting his right to a seat in this House; and,

Whereas, The Speaker decided that the last mentioned motion was out of order, and that the said Peter Allen had a right to vote thereon; and,

Whereas, The last mentioned decision of the Speaker was appealed from, on the ground that the said Peter Allen had not a right to vote on the question, whether he had a right to vote on a question collaterally affecting his right to a seat in this House; and,

Whereas, A motion was thereupon made that the name of the

said Peter Allen should be passed over, in calling of the division on the said appeal; and,

Whereas, The Speaker decided that the last mentioned motion was out of order, and that the said Peter Allen might vote on the last aforesaid appeal as a question of order; and,

Whereas, On the second day of February instant, the said petition of Henry Fellows, and the documents accompanying the same, was read, from which documents it appeared that the said Peter Allen had no right to a seat in this House; and,

Whereas, The said Peter Allen did not deny the authenticity of the said documents, nor the truth of the facts contained therein; and,

Whereas, On the third day of February instant, a motion was made that the House should agree to a resolution, in the words following, to wit:

“*Resolved*, That this House will immediately proceed to nominate and appoint a Council of Appointment;” and,

Whereas, A motion was thereupon made that the House should agree to strike out the word *immediately*, in the said resolutions, and to add to the same the words following, to wit: “On Wednesday next, and that in the meantime the House will proceed to consider and determine the right of Peter Allen to his seat in this House;” and,

Whereas, A motion was then made that the House should agree to exclude the said Peter Allen from voting on the said proposed amendment, and that he retire from the House; and,

Whereas, The Speaker decided that the last mentioned motion was out of order; and,

Whereas, The last mentioned decision of the Speaker was appealed from; and,

Whereas, On the fifth day of February instant, the House proceeded to the consideration of the last mentioned appeal, and the ayes and noes being called for, a motion was made that the House should agree to order the said Peter Allen to withdraw during the taking of the division of the House on the said appeal; and,

Whereas, The Speaker decided that the last mentioned motion was out of order; and,

Whereas, The question being put, whether the House would agree to strike out the word *immediately*, in the said resolution, and to add to the same the words following, to wit: "On Wednesday next, and that in the meantime the House will proceed to consider and determine the right of Peter Allen to his seat in this House," and the yeas and nays being called for, and the said Peter Allen voting in the negative, the House was equally divided, whereupon the Speaker gave the casting vote in the negative; and,

Whereas, A motion was then made that the House should agree to expunge from the said division, the vote of the said Peter Allen; and,

Whereas, The question being put, whether the House would agree to the said motion, and the yeas and nays being called for, and the said Peter Allen voting in the negative, the House was equally divided, whereupon the Speaker gave the casting vote in the negative; and,

Whereas, A motion was thereupon made that the House should agree to insert in the said proposed resolution, before the word *immediately*, the words "on Thursday next proceed to inquire into the right of Peter Allen to a seat in this House, and thereafter;" and,

Whereas, The Speaker decided that the said proposed amendment was out of order; and,

Whereas, The last mentioned decision was appealed from; and,

Whereas, The yeas and nays upon the said appeal being called for, and the said Peter Allen voting in support of the said decision, the House was equally divided, whereupon the Speaker decided the said appeal to be lost; and,

Whereas, The question being then put, whether the House would agree to the said resolution, immediately to proceed to nominate and appoint a council of appointment, and the yeas and nays being called for, and the said Peter Allen voting in the affirmative,

the House was equally divided, whereupon the Speaker gave the casting vote in the affirmative; and,

Whereas, The House thereupon proceeded to nominate a council of appointment; and,

Whereas, It was thereupon moved, that the House should agree to a resolution in the words following, to wit:

“Resolved, That Darius Crosby, one of the Senators from the southern district; William Ross, one of the Senators from the middle district; Parley Keys, one of the Senators from the eastern district; and Archibald S. Clark, one of the Senators from the western district, be and they are hereby nominated and appointed, according to the form and effect of the articles of the Constitution in such case made and provided, a council for the appointment of all officers within this State, other than those who by the Constitution are directed to be otherwise chosen or appointed,” and,

Whereas, The question being put, whether the House would agree to the said resolution and the yeas and nays called for, and the said Peter Allen voting in the affirmative, the House was equally divided, whereupon the Speaker gave the casting vote in the affirmative; and,

Whereas, On the sixth day of February instant, a motion was made that the House should agree to a resolution in the words following, to wit:

“Resolved, That this House will proceed to investigate the merits of the claim of Henry Fellows to a seat as one of the members of Assembly, elected in and for the county of Ontario, and that Peter Allen, the sitting member, appear and be heard in his defense,” and,

Whereas, It was thereupon moved that the said resolution be laid upon the table; and,

Whereas, The question being put, whether the House would agree thereto, and the ayes and noes being called for, a motion was made that the House should exclude the said Peter Allen from a vote on the last mentioned question; and,

Whereas, The Speaker decided that said motion was out of order; and,

Whereas, The question being put on the said motion to lay upon the table the said proposed resolution, and the ayes and noes being called for, and the said Peter Allen voting in the affirmative, the House was equally divided, whereupon the Speaker gave the casting vote in the affirmative; and,

Whereas, On the last day aforesaid, the said petition of Fellows, and the documents accompanying the same, were referred to the committee of privileges and elections; and,

Whereas, On the ensuing day the said committee reported, in substance, that the said Peter Allen had appeared before them, and had not denied the authenticity of the said documents, nor the truth of the facts therein set forth; and that it was the unanimous opinion of the said committee that the seat of the said Peter Allen ought to be vacated; and,

Whereas, It was thereupon moved, that the House should agree to a resolution that the seat of the said Peter Allen ought to be vacated; and,

Whereas, The question being put, whether the House would agree to the said resolution, and the yeas and nays being called for, it appeared that every member present, except one, voted in the affirmative; and,

Whereas, It is contrary to the practice of this and all other well regulated legislative bodies, and to reason, justice and law, to permit any man to be a judge in his own cause, or to allow him by his own vote to defeat or postpone an inquiry into his right to sit in this House, or decide upon his own right to vote therein; and,

Whereas, By divers of the before recited decisions, the said Peter Allen was permitted to vote for the postponement of an inquiry into his own right to sit in this House, and did, in fact, by his own vote defeat such inquiry until after he had voted for certain Senators to constitute a council of apportionment, which Senators would not have been elected if the right of the said Peter

Allen to sit in this House had been previously investigated and decided; and,

Whereas, By divers others of the said recited decisions, it was decided that the said Peter Allen had a right to vote on the question *whether he had a right to vote*, and did in fact, by his own vote, decide such questions in his own favor; and to the end that the said decisions may never hereafter be considered as precedents, and that they may be marked with the disapprobation and displeasure of this House;

Resolved, That all the before recited decisions, whereby it was decided that the said Peter Allen had a right to vote upon questions which tended, directly or indirectly, to decide whether an inquiry into his right to sit in this House should or should not be delayed; or whereby it was decided that the said Peter Allen had a right to vote upon the question whether he had or had not a right to vote; are contrary to the practice of all well regulated legislative bodies, and are unreasonable, unjust and illegal, and are expressly disapproved and condemned by this House. And,

Whereas, It appears from the proceedings before recited, that it was decided to proceed to the election of a Council of Appointment before any inquiry was made into the right of the said Peter Allen to a seat in this House, although there was then before the House official documents, undenied by the said Peter Allen, and proving that he had no right to sit therein, upon which said documents the House, after the election of the said Council, resolved that his seat should be vacated;

Resolved, That the decision to proceed, under such circumstances, to the election of a Council of Appointment previous to any inquiry into the right of the said Peter Allen to vote thereat, was improper and unjust, and irreconcilable to the spirit of the Constitution of this State.

Mr. Speaker put the question whether the House would agree thereto, and it was carried in the affirmative.

The ayes and noes being called for by Mr. Beach, seconded by Mr. Burt, were as follows, to wit:

For the affirmative, 62.

For the negative, 57.

Assembly Journal, 1816, pages 99, 100, 101, 102, 103.

Case of Abram Camp and Henry Huntington.

COUNTIES OF ONEIDA AND OSWEGO — PETITION PRESENTED.

IN ASSEMBLY, *November 6, 1816.*

The petition of Abram Camp, setting forth that he was a candidate for the Assembly at the last anniversary election, in the county of Oneida; that in some of the returns by the inspectors to the county clerk, the Christian name of the petitioner is spelled Abraham, instead of Abram, and that the clerk of the said county of Oneida, therefore, refuses to give him a certificate, and praying that the matter may be duly inquired into, and he be admitted to his seat as a member of the House, was referred to the committee of privileges and elections.

Assembly Journal, 1816, page 14.

REPORT OF COMMITTEE — ABRAM CAMP AWARDED SEAT.

IN ASSEMBLY, *November 9, 1816.*

Mr. Sargent, from the committee on privileges and elections, on the petition of Abram Camp, reported:

That it appears by the affidavits and certificate of the inspectors of election of the towns of Lee, Sangerfield and Verona, that the votes returned from each of those towns as given to Abraham Camp, were actually given to Abram Camp, and were returned to Abraham by mistake; and it further appears to the committee, by adding the votes of the above three towns to those returned from other towns, for the said Abram Camp, that he will then have a larger number of votes than Henry Huntington, to whom the

certificate was given; the committee, are, therefore of opinion, that Abram Camp was duly elected a member of this House, from the counties of Oneida and Oswego, and is entitled to his seat in the same; thereupon,

Resolved, That Abram Camp is duly elected a member of this House, from the counties of Oneida and Oswego, in the room of Henry Huntington, to whom a certificate of election appears to have been given.

Assembly Journal, 1816, page 38.

ABRAM CAMP TAKES THE OATH OF OFFICE.

IN ASSEMBLY, *January 14, 1816.*

Mr. Abram Camp, a member of Assembly, duly elected in and for the county of Oneida, appeared in the Assembly Chamber; thereupon,

Ordered, That Mr. Barnes and Mr. Prendergast attend with Mr. Camp, before some proper officer, and see him duly qualified.

Mr. Barnes reported, that pursuant to the order of the House, Mr. Prendergast and himself had attended with Mr. Camp, before Martin Van Buren, Esq., Attorney-General of this State, who had duly administered to Mr. Camp the oath of abjuration and allegiance, as by law required, and the oath to support the Constitution of the United States; thereupon,

Ordered, That Mr. Camp do take his seat.

Assembly Journal, 1816, page 53.

Case of Stephen Todd and Christopher P. Bellinger.

HERKIMER COUNTY — PETITION OF STEPHEN TODD PRESENTED.

Assembly Journal, 1822, page 31.

REPORT OF COMMITTEE — STEPHEN TODD AWARDED SEAT.

IN ASSEMBLY, *January, 1822.*

Mr. Finch, from the committee on privileges and elections, to whom was referred the petition of Stephen Todd, contesting the

seat of Christopher P. Bellinger of the county of Herkimer, reported. That the committee having investigated the claim of the said Stephen Todd to be admitted to his seat, as a member of this House, in the place of the said Christopher P. Bellinger, who was returned by the clerk of the county of Herkimer as duly elected; that Mr. Bellinger and Mr. Todd appeared before the committee, in pursuance of notice given them; that from the documents referred to the said committee, it appears that of the whole number of votes given in said county at the last election for member of Assembly, excepting the votes of the towns of Russia, Winfield and Danube, the said Christopher P. Bellinger had one thousand five hundred and twenty-six votes, and that the said Stephen Todd had one thousand five hundred and twenty-three votes; that in the town of Russia the said Christopher P. Bellinger had fifty-seven votes, and the said Stephen Todd had ninety-six votes, which votes were rejected, the return not being dated; that in the town of Danube the said Christopher P. Bellinger had one hundred and sixty-one votes, and the said Stephen Todd had two hundred and two votes, which were returned to the clerk's office of said county as given for Stephen Todd; that in the town of Winfield the said Christopher P. Bellinger had sixty-one votes, and the said Stephen Todd had one hundred and twenty-one votes; that the clerk of said county wholly rejected the returns of the said town of Winfield, which is in the words and figures following, to-wit:

ELECTION FOR ASSEMBLY, 1821, }
Herkimer County, } ss.

A statement of votes taken at the anniversary election in the town of Winfield, county of Herkimer, commencing on the last Tuesday of April, one thousand eight hundred and twenty-one, and continued by adjournment the two succeeding days.

Robert Shoemaker, for Assembly, one hundred and twenty-one votes.

Simeon Ford, for Assembly, one hundred and nineteen votes.

Stephen Todd, for Assembly, one hundred and twenty votes.

Christopher P. Bellinger, for Assembly, sixty-one votes.

Jonas Cleland, for Assembly, sixty-one votes.

Sherman Wooster, for Assembly, sixty-one votes.

We certify the above to be a correct and true statement and estimate of the votes taken at the above election.

Given under our hands, at Winfield, this twenty-sixth day of April, 1820.

MATHEW KEITH,
CHARLES REID,
LARKEN SMITH,
SHULER FISHER,
ABR. WOODRUFF,

Inspectors of Election.

That the committee are unanimously of opinion that the said return ought to have been received and allowed by the clerk of the said county, in calculating and deciding who were duly elected from the said county, members of this House.

It also appears that if the said return of Winfield was wholly rejected, and the votes which were given for the said Stephen Todd, in the town of Danube, but through the inattention of the inspectors of said town returned as given for Stephen Tood, were allowed to the said Stephen Todd, that then he would be entitled to his seat.

The committee are, therefore, unanimously of opinion that the seat of Christopher P. Bellinger should be vacated, and that the said petitioner be admitted as a member of this House; thereupon,

On motion of Mr. Finch,

Resolved, That Stephen Todd ought to be admitted to take his seat as a member of this House of Assembly, duly elected in the county of Herkimer, in the room of Christopher P. Bellinger, the sitting member, and that the seat of the said Christopher P. Bellinger, the sitting member, be vacated. Thereupon, Mr. Stephen Todd, who was declared a member of Assembly, elected in and for

the county of Herkimer, appeared in the Assembly Chamber, was duly qualified, and took his seat.

Assembly Journal, 1822, pages 37, 38, 39.

Case of Isaac Phelps, Jr., and David Eason.

COUNTIES OF NIAGARA, ERIE, CATTARAUGUS AND CHAUTAUQUA —
PETITION OF ISAAC PHELPS, JR., PRESENTED.

IN ASSEMBLY, *January 4, 1822.*

The petition of Isaac Phelps, Jr., setting forth that the petitioner was, at the last anniversary election, duly elected a member of this Assembly, in and for the district composed of the counties of Niagara, Erie, Cattaraugus and Chautauqua, and that the clerk of Erie county improperly returned the name of David Eason as the member elected for the said district, and praying for permission to take his seat, was read and referred to the committee on privileges and elections.

Assembly Journal, 1822, pages 35, 36.

REPORT OF COMMITTEE — ISAAC PHELPS, JR., AWARDED THE
SEAT.

IN ASSEMBLY, *January 5, 1822.*

Mr. Finch, from the committee of privileges and elections, to whom was referred the petition of Isaac Phelps, Jr., claiming the seat of David Eason in this House, reported:

That they have investigated the claim of the said Isaac Phelps, Jr., to be admitted to his seat as a member of this House, in the place of David Eason, who was returned by the clerk of the county of Erie as duly elected; that Mr. Eason and Mr. Phelps, according to notice given to that effect, appeared before the committee on their respective claims; that from the documents referred to the committee, the following facts are fully and clearly proven, and were not contradicted or denied by Mr. Eason:

That at the last anniversary election for members of Assembly in the counties of Niagara, Erie, Cattaraugus and Chautauqua, it

appears by the affidavit of Asher Freeman, Joseph Odell, Warren Rosekrans and Nathan Comstock, inspectors of the said election in the town of Royalton in the county of Niagara, that Isaac Phelps, Jr., had one hundred and twenty-eight votes; that after canvassing the votes given at said election, they proceeded to make return thereof to the clerk of the county of Erie, in which return the said votes for Isaac Phelps, Jr., were returned as votes for Isaac Phelps, were printed, and that there can be no mistake of their having on them the name of Isaac Phelps, Jr.

It further appears by the affidavit of John Welch, John March, James Greene, Myron Newell and Daniel Webster, inspectors of election in the town of Eden, in the county of Erie, at the aforesaid election, that Isaac Phelps, Junior, had forty-four votes; and that in making a return thereof to the clerk of the county of Erie, the said votes for Isaac Phelps, Junior, were returned as votes for Isaac Phelps, by mistake; and that all the votes so given for Isaac Phelps, Junior, and returned as votes for Isaac Phelps, were printed, and that there can be no mistake of their having on them the name of the said Isaac Phelps, Junior.

The committee further report, that the whole number of votes given at the said election in and for the counties of Niagara, Erie, Cattaraugus and Chautauqua, for David Eason, was two thousand four hundred and twenty-six; for Isaac Phelps, Junior, two thousand two hundred and seventy-five; and for Isaac Phelps, one hundred and seventy-eight.

The committee are, therefore, unanimously of opinion that the seat of David Eason, Esquire, should be vacated, and that the petitioner be admitted as a member of this House.

Thereupon, on motion of Mr. Finch,

Resolved, That Isaac Phelps, Junior, ought to be permitted to take his seat as a member of the House of Assembly, duly elected in the counties of Niagara, Erie, Cattaraugus and Chautauqua, in the room of said David Eason, the sitting member, and that the seat of David Eason, the sitting member, be vacated accordingly.

Thereupon, Mr. Isaac Phelps, Junior, who was declared member

of Assembly, duly elected in and for the district composed of the counties of Niagara, Erie, Cattaraugus and Chautauqua, appeared in the Assembly Chamber, was duly qualified and took his seat. Assembly Journal, 1822, page 39.

Case of Walter C. Livingston and Thomas Bay.

COLUMBIA COUNTY — PETITION PRESENTED.

January 8, 1824.

The petition of Walter C. Livingston, of the county of Columbia, setting forth that Thomas Bay, of that county, has been improperly returned as a member of Assembly, and praying for permission to take his seat as a member of this House, was read, and with the accompanying documents referred to the committee of privileges and elections.

Assembly Journal, 1824, page 23.

REPORT OF COMMITTEE.

Mr. Monell, from the committee of privileges and elections, to whom was referred the petition of Walter C. Livingston, contesting the seat of Thomas Bay, of the county of Columbia, reported:

That the committee having investigated the claim of the said Walter C. Livingston, to be admitted to his seat as a member of this House, in the place of the said Thomas Bay, who was returned by the clerk of the county of Columbia as duly elected. That Mr. Livingston appeared before the committee, in pursuance of notice given him. That from the documents referred to the said committee, it appears from the whole number of votes given in the said county, at the last election for members of Assembly, excepting the town of Stuyvesant, the said Walter C. Livingston had two thousand four hundred and twenty-seven votes, and that the said Thomas Bay had, including the town of Stuyvesant, two thousand four hundred and seventy-eight votes; that in the town of Stuyvesant, the said Walter C. Livingston received one hundred and

thirty-nine votes, which votes were rejected by the board of canvassers, the return being made for Walter C. W. Livingston, which return is hereto annexed.

The committee are, therefore, of opinion, that the said return ought to have been received and allowed by the said board of canvassers, in calculating and deciding who were duly elected from the said county member of this House.

The committee are, therefore, of opinion, that the seat of Thomas Bay, a member returned from the county of Columbia, be vacated, and that the said petitioner, Walter C. Livingston, be admitted as a member of this House from the county of Columbia.

COLUMBIA COUNTY — TOWN OF STUYVESANT.

A true canvass and estimate of votes taken at an election, held in the town of Stuyvesant, in the county of Columbia, on the third day of November, in the year 1823, and the two succeeding days, inclusive, to elect two Senators and three members of Assembly, and the number of votes taken for Senators was as follows, viz.: Edward P. Livingston had one hundred and forty-five votes; Jacob Haight, one hundred and forty-two votes; one vote for Philip Van Rensselaer, and one vote for Elisha Williams; and for members of Assembly, the following names had the number of votes, as follows: John King, one hundred and forty-one votes; Joseph D. Monell, one hundred and forty-five votes; Thomas Bay, one hundred and forty-one votes; Walter C. Livingston, one hundred and thirty-nine; Herman Livingston, one hundred and forty votes, and Thaddeus Elmore, one hundred and thirty-eight votes.

Given under our hands at Stuyvesant, this 6th day of November, 1823.

PETER I. VOSBURGH,
ARENT VOSBURGH,
B. VAN DERPOEL,
JOHN I. SHARP,
JOHN A. STAATS,

Inspectors.

I certify the above to be a true copy of the original record by me in the town book, for the town of Stuyvesant.

ARENT VOSBURGH,

Town Clerk.

STUYVESANT, 1 *January*, 1824.

WALTER C. LIVINGSTON AWARDED THE SEAT.

Thereupon, that Walter C. Livingston ought to be permitted to take his seat as a member of the House of Assembly, duly elected for the county of Columbia, in the room of Thomas Bay, the member returned, and that the seat of the said Thomas Bay be vacated.

Thereupon, Mr. Livingston, who was declared a member of Assembly, elected in and for the county of Columbia, appeared in the Assembly Chamber.

Ordered, That Mr. Monell and Mr. Warren wait upon Mr. Livingston before some proper officer and see him duly qualified.

Mr. Warren reported that Mr. Monell and himself had waited upon Mr. Livingston before Samuel Talcott, Esq., Attorney-General of this State, and seen him duly qualified.

Ordered, That Mr. Livingston do take his seat.
Assembly Journal, 1824, pages 25, 26.

Case of Tilly Lynde and John C. Clark.

CHENANGO COUNTY — PETITION PRESENTED.

IN ASSEMBLY, *January 5*, 1826.

The petition of Tilly Lynde, of the county of Chenango, setting forth he is entitled to a seat in this House, in the place of John C. Clark who holds the certificate, and praying for permission to take his seat, was read and referred to the committee on privileges and elections.

Assembly Journal, 1826, page 40.

REPORT OF COMMITTEE — TILLY LYNDE AWARDED SEAT.

IN ASSEMBLY, *January 6, 1826.*

Mr. Woodcock, from the committee on privileges and elections, to whom was referred the petition of Tilly Lynde, praying that he may be permitted to take his seat as member of Assembly, in place of John C. Clark, reported:

That they have investigated the claim of the said Tilly Lynde, having first notified the said John C. Clark and the said Tilly Lynde to appear before the said committee. The facts contained in the documents accompanying this report were neither contradicted or denied; and from which facts it appears that at the last anniversary election for member of Assembly, held in the county of Chenango, two thousand two hundred and sixty-one votes were given in said county for John C. Clark for member of Assembly, and that two thousand three hundred and thirty-five votes were given in said county for Tilly Lynde for member of Assembly.

It further appears, from the affidavits of Edward Loomis, supervisor of the town of Smithville, in said county, and of Squire Hamilton and Darius Towslee, two of the inspectors of the election of said town, that one hundred and thirty votes were given in the said town of Smithville for Tilly Lynde for member of Assembly; that the said one hundred and thirty votes, given for said Tilly Lynde, were returned by said inspectors to the county clerk as one hundred and thirty votes given for T. Lynde.

This fact is also corroborated by the certificate of the clerk of said county of Chenango.

It further appears that the votes of the town of Otselic in said county were lost. This fact appears by an affidavit of George R. Cooley, supervisor of said town, and also by the certificate of the said clerk; in which town the said John C. Clark had had sixty-one votes for member of Assembly, and the said Tilly Lynde seventy-five votes for member of Assembly.

But the committee are satisfied, without examining the question whether the votes of the town of Otselic ought to be received, that

the votes of the town of Smithville, which were given for Tilly Lynde, and returned by the inspectors for T. Lynde, ought to be received, and which would give to the petitioner a greater number of votes than were given in said county for the said John C. Clark.

The Constitution of our State and the statute regulating elections warrants this conclusion; precedent has established it.

The committee are, therefore, unanimously of the opinion that the seat of John C. Clark should be vacated, and that the petitioner should be admitted a member of this House, and have directed their chairman to offer the following resolution:

Resolved, That Tilly Lynde ought to be permitted to take his seat as a member of the House of Assembly, duly elected from the county of Chenango, in the place of John C. Clark, the sitting member; and that the seat of the said John C. Clark, the sitting member, be vacated accordingly. Thereupon,

Resolved, That Tilly Lynde ought to be permitted to take his seat, as a member of the House of Assembly, duly elected from the county of Chenango, in the place of John C. Clark, the sitting member; and that the seat of the said John C. Clark, the sitting member, be vacated accordingly.

Thereupon, Mr. T. Lynde, a member of Assembly elected in and for the county of Chenango, appeared in the Assembly Chamber.

Ordered, That Mr. Woodcock and Mr. E. W. King wait upon him before some proper officer, and see him duly qualified.

MR. LYNDE TAKES THE OATH OF OFFICE.

Mr. Woodcock reported, that pursuant to the order of the House, Mr. E. W. King and himself had attended with Mr. Lynde before Samuel A. Talcott, Esq., Attorney-General of this State, and seen him duly qualified. Thereupon,

Ordered, That Mr. Lynde do take his seat.

Assembly Journal, January 6, 1826.

Case of Matthias I. Bovee and Alexander Sheldon, Montgomery County.

PETITION PRESENTED.

IN ASSEMBLY, *January 6, 1826.*

The petition of Matthias I. Bovee, praying that he may be admitted to a seat in this House, in the place of Alexander Sheldon who has been returned as a member elected in and for the county of Montgomery, was read and referred to the committee on privileges and elections.

Assembly Journal, 1826, page 45.

REPORT OF COMMITTEE IN FAVOR OF MR. SHELDON.

IN ASSEMBLY, *January 16, 1826.*

Mr. Woodcock, from the committee on privileges and elections, to whom was referred the petition of Matthias I. Bovee, of the county of Montgomery, praying that the seat of Alexander Sheldon, a member of this House, might be vacated, and the petitioner admitted to a seat in this House, reported:

That, from a certified copy of the canvass of the several towns of the county of Montgomery, duly authenticated under the hand and seal of the clerk of the said county, it appears that there were given, in the several towns in said county, for the petitioner Matthias I. Bovee, two thousand seven hundred and fifteen votes; and for the sitting member, Alexander Sheldon, two thousand seven hundred and twelve votes.

That in addition to the above number of votes thus canvassed, it appears that nine scattering votes, of the following description, were canvassed and returned by the town inspectors to the county canvassers as scattering votes, to wit: two votes in the town of Johnstown, one given for Alexander Sheldin the other given for Elexander Sheldon; three votes in the town of Root for Alexr. Sheldon; two votes in the town of Glen for Alx. Sheldon, one vote in the same town for A. Sheldon; and one vote in the town of Oppenheim, for Alex. Sheldon.

The committee further report, that nine scattering votes were also returned by said town inspectors to the canvassers of said county, of the following description, to wit: one vote in the town of Minden for Matthias Bover; three votes in the town of Florida for M. I. Bover; one vote in the town of Amsterdam for M. Bovee, one vote in the same town for M. I. Bovee, one vote in the same town for Bovee, and one vote in the town of Broadalbin for Matthias Bovee.

It also appears that the board of canvassers in said county of Montgomery, canvassed and allowed to the said Alexander Sheldon, the following five votes of the said scattering votes, to wit: one vote for Alexander Sheldin, one vote for Elexander Sheldon, and three votes for Alex'r Sheldon; and disallowed to the said Matthias I. Bovee the nine scattering votes returned as aforesaid.

The above facts were proved to the committee, and admitted by the petitioner and the said Alexander Sheldon; and in addition to the above facts, the petitioner offered to prove,

1. That he is a native of the town of Amsterdam, in the county of Montgomery; and, with the exception of two years, has always resided in that town.

2. That the petitioner has been well known in the county of Montgomery, and especially in the town of Amsterdam, for the last ten years.

3. That there is no other person of the name of Matthias Bovee, nor any other person of the name of Bovee, the initials of whose Christian name begins with M. I. or M., except himself.

4. That the petitioner was nominated as a candidate for the Assembly from the county of Montgomery, several weeks before election; and that it was well known to the electors of that county, that he was such candidate, and also that there was no other person of the name of Bovee, known as such candidate, but himself.

5. That one of the scattering defective ballots having on it the name of M. I. Bovee was given by Jabez Livermore, of the town of Florida, that another of the same description was given by David

Brewer of the same town, and that another ballot having on it the name of M. Bovee, was given by Peter D. Graff, of the town of Amsterdam, and that each of those persons intended to vote for the said petitioner, and would prove by those persons that such were their intention.

6. That there is another person of full age in the county of Montgomery, of the name of Alexander Sheldon, besides the sitting member, and also another by the name of Sheldon whose Christian name begins with the letter A.

On the part of the sitting member it was proposed to prove,

1. That there is no man in the county of Montgomery by the name of Sheldon, the initial of whose name is A. except himself and his son, whose name is Alexander Sheldon, Jr., and who is a minor.

That there is a man of full age residing in the county of Montgomery whose name is Matthias Bovee.

The committee, for the purpose of bringing an important question before the House, grant the position that all the facts proposed to be proved by the petitioner and the sitting members are substantially true and could be proved.

The question then is, was it the duty of the committee to have received the evidence?

A majority of the committee, after a deliberate and careful examination, have decided that they would not hear the testimony, that it would be dangerous and improper.

The whole of the points, as proposed to be proved by the petitioner and the sitting member, embrace this one important question. The admission of testimony to show the intent of the voter. Would it be safe, would it be for the furtherance of justice to admit affidavits or hear parol evidence to show that intention? Would it not open a door to fraud and perjury, and more than balance the inestimable privilege which every freeman enjoys, the right to his elective franchise? A majority of your committee believed it would. They have laid down this principle, that they would

not go beyond the ballot box to inquire for whom was the vote given. Neither would they inquire whether any other person of the same or a similar name did or did not reside in the same county with the petitioner and sitting member; but that possessing a supervisory power over the canvass of the town inspectors, and the canvass of the county canvassers, they would review and canvass them and the ballots as far as they were identified to have been given at the poll by an elector.

It is with great deference that your committee have submitted to the House this opinion. But believing that it is the solemn duty of a committee fearlessly to examine and pronounce their judgment upon all subjects which the House gives them in charge; and in coming to this conclusion they are aware that they have confined themselves to rules more limited than the rules adopted by the Congress of the United States. But believing the rules thus adopted more safe, and less liable to be perverted for bad purposes, they have adopted them, leaving it to the good sense of this House to correct the errors of your committee.

The only remaining duty for the committee was the canvass of the nine scattering votes given as aforesaid for the petitioner, and the nine scattering votes given for the sitting member, as returned by the town inspectors to the county canvassers. In performing this duty a majority of the committee have adopted some of the rules laid down by the State canvassers, to wit: that the want of a middle letter in the name of the person voted for is fatal and cannot be allowed; and that the natural or usual and accepted abbreviation of the Christian name should be allowed; that they will not search for the intention of the voter; that the vote must be written or printed, or partly written or partly printed, with the name at full length, or the Christian name abbreviated in the usual and received acceptation of abbreviations.

In coming to this decision the committee have not considered that they are confined to the same limits in giving the same construction to votes as the canvassers of the State. They admit the

right of this House to judge of its own members and pass on votes given, and the intention of the voter.

But the safety of a principle in canvassing, beyond the one adopted by your committee, admits of serious doubts. In its application it might be dangerous, and the question is seriously put to the House, whether the purity of your elections, and the intent of the elector, will not be better preserved, and understood, than by adopting a rule, the bounds of which it would be difficult to fix?

The rule the committee have adopted embraces within itself its own evidence, unaided by the frailty of memory, or liable to be perverted by prejudice or misconstruction. In pursuance of this rule, a majority of the committee have come to the following result: They do not allow the petitioner either of the nine scattering votes; that they do not allow to the sitting member the five following scattering votes, which were allowed by the county canvassers, viz.: One vote for Alexander Sheldin, one vote for Elexander Sheldon, and three votes for Alex Sheldon. This canvass gives to the said Alexander Sheldon, a greater number of votes for member of Assembly than were given to the petitioner.

A majority of the committee are of the opinion that the sitting member, Alexander Sheldon, was, at the last anniversary election, held in the county of Montgomery duly elected a member of this House, and entitled to retain his seat therein, and have instructed their chairman to offer the following resolution:

Resolved, That the petitioner have leave to withdraw his petition.

Ordered, That the same do lie upon the table.

Ordered, That the usual number of copies of the same be printed for the use of the Legislature.

Assembly Journal, 1826, pages 167, 168.

COMMITTEE OF THE WHOLE.

IN ASSEMBLY, *January 23, 1826.*

The House resolved itself into a committee of the whole, on the resolution reported by the committee on privileges and elections,

on the petition of Matthias J. Bovee, for permission to take his seat as a member of this House, in the place of Alexander Sheldon, and after some time spent thereon Mr. Speaker resumed the chair, and Mr. E. W. King from the said committee, reported that the committee had agreed to amend the said resolution, by striking out the same, and inserting instead thereof the following:

Resolved (as the sense of this committee), That Alexander Sheldon is not entitled to a seat in this House.

Resolved (as the sense of this committee), That Matthias J. Bovee is entitled to a seat in this House.

Which he was directed to report to the House, and he read the report in his place, and delivered the same at the table, where it was again read; thereupon,

Ordered, That the question on agreeing with the committee of the whole, in their preceding report, be postponed until to-morrow. Assembly Journal, 1826, page 341.

REPORT CONSIDERED.

IN ASSEMBLY, *January 24, 1826.*

The House proceeded to the consideration of the report of the committee of the whole on the resolution reported by the committee on privileges and elections, on the petition of Matthias J. Bovee for permission to take his seat as a member of this House, in the place of Alexander Sheldon. Thereupon,

The resolutions reported by the committee of the whole were read in the words following:

Resolved (as the sense of this committee), That Alexander Sheldon is not entitled to a seat in this House.

Resolved (as the sense of this committee), That Matthias J. Bovee is entitled to a seat in this House.

Debates were had upon the first of the said resolutions, and the questions being put whether the House would agree with the committee of the whole in that part of their report, and it was determined in the affirmative.

Ayes, 59. Nays, 56.

Thereupon, debates were had upon the second of the said resolutions, and the question being put whether the House would agree with the committee of the whole in that part of their said report, and it was determined in the affirmative.

Ayes, 61. Nays, 54.

Thereupon,

Resolved, That Alexander Sheldon is not entitled to a seat in this House.

Resolved, That Matthias J. Bovee is entitled to a seat in this House.

Assembly Journal, 1826, pages 343-345.

Case of Edward Suffern and Abraham Gurnee, Rockland County.

PETITION PRESENTED.

IN ASSEMBLY, *January 6, 1826.*

The petition of Edward Suffern, of the county of Rockland, praying for permission to take his seat as a member of this House, in the place of Abraham Gurnee, the member returned from that county, was read and referred to the committee on privileges and elections.

Assembly Journal, 1826, page 46.

REPORT OF COMMITTEE.

IN ASSEMBLY, *January 18, 1826.*

Mr. Woodcock, from the committee on privileges and elections, to whom was referred the petition of Edward Suffern, contesting the seat of Abraham Gurnee, the sitting member from the county of Rockland, reported:

That they have had the same under consideration and that the following facts are proved: That, at the last anniversary election, held in the county of Rockland, for member of Assembly, the clerk of said county certified that three hundred and ninety-five votes were given for the petitioner for member of Assembly, and that

three hundred and ninety-six votes were given for the said Abraham Gurnee, the sitting member. In addition to the three hundred and ninety-five votes given for the petitioner as aforesaid, the petitioner claims to have allowed a vote given for him in the town of Hempstead, which vote is annexed to the affidavit of Tunis Cooper; in which affidavit the said Tunis Cooper swears that he is the town clerk of the town of Hempstead, and was one of the inspectors of election of said town at the last election; that the vote was taken from the Assembly ballot box, and was not allowed and canvassed for the said petitioner; the same fact is also proved by the affidavit of Garret A. Haring, who was one of the inspectors of the election of said town of Hempstead, the same fact is also proved by the affidavit of Harman Goetschius, who was one of the clerks of the board of inspectors for said town. From these affidavits, a majority of the committee are satisfied that the vote annexed to the affidavit of the said Tunis Cooper was a vote given in the town of Hempstead for the petitioner, and that it was not rejected by the inspectors of said town, on the ground of the ballots in the box exceeding in number the list of the same kept by the clerks. A majority of the committee have canvassed and allowed said vote to the petitioner. The petitioner further claims to be allowed a vote given in the said town of Hempstead, which through the mistake of the inspectors was put into the electoral ballot box having the name of the petitioner for member of Assembly thereon. This fact was satisfactorily proved by the affidavit of the said Garret A. Haring and Harman Goetschius. This vote a majority of the committee have canvassed and allowed to the petitioner, which gives him a majority of one over the sitting member. The petitioner further claimed to have allowed a vote given in the town of Orange, and which vote is annexed to the affidavit of Richard Blauvelt. This vote was unanimously rejected by the committee. The petitioner further claimed that a vote given in the town of Clarkstown for Abraham Gur or Gurn was allowed to the sitting member, and that said vote ought to have

been rejected. The committee were unanimously of opinion that this vote ought to be allowed. It further appeared that the inspectors of the towns of Clarkstown, Hempstead and Orange allowed votes which were written Abram Gurnee, to the sitting member. The petitioner contended that these votes ought to have been rejected. They were allowed by the committee. The committee have thus briefly stated the facts in the case which will be fully shown by the documents accompanying this report. The allowance of the two votes for the petitioner, beyond the canvass of the town inspectors, is a question of fact and does not in the opinion of the committee violate any principle as laid down by them in the case of Matthias J. Bovee. A majority of the committee are therefore of opinion that the seat of the said Abraham Gurnee should be vacated and the petitioner admitted a member of this House, and have instructed their chairman to offer the following resolution:

Resolved, That Edward Suffern ought to take his seat as a member of the House of Assembly, duly elected in the county of Rockland, in the place of Abraham Gurnee, the sitting member, and that the seat of the said Abraham Gurnee, the sitting member, be vacated accordingly; thereupon,

Ordered, That the said report and resolution be committed to a committee of the whole house.

Ordered, That the usual number of copies of the same be printed for the use of the Legislature.

Assembly Journal, 1826, pages 193, 194.

REPORT CONSIDERED.

IN ASSEMBLY, *January 26, 1826.*

The House proceeded to the consideration of the amendment offered by Mr. Root to the report of the committee on privileges and elections on the petition of Edward Suffern for permission to take his seat as a member of this House in the place of Abraham Gurnee; the said amendment being to strike out that part of the

report granting the petitioner leave to withdraw his petition, and inserting instead thereof the words following, to wit:

Resolved, That Abraham Gurnee is not entitled to a seat in this House.

Resolved, That Edward Suffern is entitled to a seat in this House.

Debates were had upon the first resolution proposed as an amendment by Mr. Root, and the question being put whether the House would agree thereto, it was determined in the affirmative.

Ayes, 58. Nays, 43.

Assembly Journal, 1826, page 367.

IN ASSEMBLY, *January 27, 1826.*

Mr. Woods made a motion that the House should agree to reconsider their vote of yesterday on the resolution declaring that Abraham Gurnee is not entitled to a seat in this House.

Debates were had upon the said motion of Mr. Woods, and the question being put whether the House would agree thereto, it was determined in the negative.

Nays, 57. Ayes, 46.

Mr. Suffern awarded seat.

Thereupon, the House proceeded to the consideration of the second amendment offered by Mr. Root to amend the report of the committee on privileges and elections on the petition of Edward Suffern for permission to take his seat as a member of this House in the place of Abraham Gurnee, by striking out of the said report so much thereof as grants the petitioner leave to withdraw his petition, and inserting instead thereof the words following, to wit:

Resolved, That Edward Suffern is entitled to a seat in this House.

Debates were had thereon, and the question being put whether the House would agree to the said amendment offered by Mr. Root, and it was determined in the affirmative.

Thereupon, Mr. Suffern appeared in the Assembly Chamber.

Ordered, That Mr. Thompson and Mr. Foote be a committee to attend with Mr. Suffern before some proper officer and see him duly qualified.

Mr. Thompson reported that, pursuant to the order of the House, Mr. Foote and himself had attended with Mr. Suffern before Samuel A. Talcott, Esq., Attorney-General of this State, and seen him duly qualified; thereupon,

Ordered, That Mr. Suffern do take his seat.

Assembly Journal, 1826, pages 371, 372.

Case of John Fowks, Jr., and Thomas Tabor, 2d.

DUTCHESS COUNTY — PETITION PRESENTED.

IN ASSEMBLY, *January 9, 1826.*

The petition of John Fowks, Jr., of Dutchess county, praying that he may be admitted to a seat in this House as a member from the county of Dutchess, in the place of Thomas Tabor, 2d, who was returned as a member from that county, was read, and referred to the committee on privileges and elections.

Assembly Journal, 1826, page 53.

REPORT OF COMMITTEE — MR. FOWKS AWARDED SEAT.

IN ASSEMBLY, *January 10, 1826.*

Mr. Woodcock, from the committee on privileges and elections, to whom was referred the petition of John Fowks, Jr., of the county of Dutchess, claiming the seat of Thomas Tabor, 2d, who was returned duly elected a member of Assembly from said county, reported:

That from a certificate of the clerk of the county of Dutchess, containing a copy of the canvass of votes for members of Assembly, at the last anniversary election, it appears that Thomas Tabor, 2d, had two thousand nine hundred and thirty-two votes, and that the petitioner, John Fowks, Jr., had two thousand eight hundred and eighty-eight votes.

The petitioner alleges that, in the town of Red Hook, two hundred and thirty-nine votes were given for the petitioner, and that the same were returned by the inspectors of the board of the election to the clerk of the county, omitting the word, junior, to the name of the petitioner, by which mistake or omission, the said two hundred and thirty-nine votes, given in the said town of Red Hook for John Fowks, Jr., were not allowed to the petitioner. This fact is proved by the affidavits of the supervisor and assessors of the said town of Red Hook. And further, the clerk of the board of inspectors of said town swears, that in copying the town canvass in the name of John Fowks, Jr., by mistake, he omitted the junior.

The committee are satisfied that the two hundred and thirty-nine votes, given in the town of Red Hook, ought to be counted for the petitioner, which number added to the votes counted for the petitioner, by the county canvassers, gives him a majority over the said Thomas Tabor, 2d, of one hundred and ninety-five votes.

The committee, from the whole case, are unanimously of the opinion that the seat of Thomas Tabor, 2d, be vacated, and that the petitioner be admitted as a member of this House, and have directed their chairman to present the following resolution:

Resolved, That John Fowks, Jr., ought to be permitted to take his seat as a member of Assembly, duly elected in the county of Dutchess, in the place of Thomas Tabor, 2d, the member returned from the said county of Dutchess, and that the seat of the said Thomas Tabor, 2d, be vacated accordingly. Thereupon,

Resolved, That John Fowks, Jr., ought to be permitted to take his seat as a member of Assembly, duly elected in the county of Dutchess, in the place of Thomas Tabor, 2d, the member returned to this House from the said county of Dutchess; and that the seat of the said Thomas Tabor, 2d, be vacated accordingly.

Thereupon, Mr. Fowks, a member of Assembly elected in and for the county of Dutchess, appeared in the Assembly chamber.

Ordered, That Mr. Granger and Mr. Jewitt wait upon him before some proper officer and see him duly qualified.

Mr. Granger reported, that pursuant to the order of the House, Mr. Jewitt and himself had attended with Mr. Fowks before J. V. N. Yates, Esq., Secretary of State, and seen him duly qualified.

Ordered, That Mr. Fowks do take his seat.

Assembly Journal, 1826, pages 59, 60.

Case of Edward Allen and James Kenyon, Cayuga County.

IN ASSEMBLY, *January 4, 1827.*

Petition of Edward Allen presented and referred.

Assembly Journal, 1827, page 39.

REPORT OF COMMITTEE.

IN ASSEMBLY, *February 7, 1827.*

Mr. Mann, from the committee on privileges and elections, to whom was referred the memorial of Edward Allen, praying to be admitted to a seat in this House, as one of the members elected from the county of Cayuga, reported:

That the county of Cayuga is entitled to elect and return to this House, four members; that the three attending members and James Kenyon received the greatest number of votes, and were returned as members duly elected as members to this House for said county; that your memorialist was the fifth highest of several candidates voted for at the last annual election for members of Assembly in the county of Cayuga, who alleges that the said James Kenyon was at the time of the said election, and still is, a minister of the gospel, of the denomination of the Society of Quakers or Friends, and not eligible to or capable of holding a seat in this House, and of which the committee have conclusive evidence that the said James Kenyon is and was such minister of the gospel, "according to the rules, regulations and customs of the denomination of Friends, licensed, known and distinguished as such; and by the fourth section of the second article of the Constitution of this

State, 'no minister of the gospel, or priest of any denomination whatsoever, shall at any time hereafter, under any pretense or description whatever, be eligible to or capable of holding any civil or military office or place within this State.'"

The committee are of the opinion that the seat of the said James Kenyon is vacant.

And the committee are further of the opinion, that inasmuch as the votes so given for the said James Kenyon, being a minister of the gospel, and not eligible to or capable of holding any office, civil or military, were inoperative and void.

The committee, therefore, offer for the consideration of the House the following resolution:

Resolved, That Edward Allen is entitled to and ought to take his seat in the House as a member of the Assembly, duly elected in the county of Cayuga, in the place of James Kenyon, the member returned as elected to this House.

Ordered, That the said report and resolution be committed to a committee of the whole House.

Assembly Journal, 1827, pages 486, 487; see pages 488, 498, 499.

IN ASSEMBLY, *February 23, 1827.*

REPORT CONSIDERED IN COMMITTEE OF THE WHOLE — BOTH MR. ALLEN AND MR. KENYON DENIED SEATS.

The House then again proceeded to the consideration of the report of the committee on privileges and elections, on the petition of Edward Allen, of the county of Cayuga, claiming a seat in this House, in the place of James Kenyon.

The resolution reported by the said committee was read.

Mr. Bucklin moved to amend the report of the committee, by inserting in lieu of the said resolution, the following, to-wit:

Resolved, That James Kenyon, being a minister of the gospel, within the meaning of the fourth section of the seventh article of the Constitution of this State, is, therefore, ineligible to a seat in this House.

Mr. Speaker put the question whether the House would agree to the said amendment proposed by Mr. Bucklin, and it was determined in the affirmative.

Ayes, 63. Nays, 36.

Mr. Hay moved further to amend the report of the said committee by adding the following resolution:

Resolved, That Edward Allen is not entitled to a seat in this House.

Mr. Speaker put the question, whether the House would agree to the said amendment proposed by Mr. Hay, and it was determined in the affirmative.

Ayes, 74. Nays, 26.

Assembly Journal, 1827, pages 831, 832.

Case of John A. Bryan and James McGlashan.

CATTARAUGUS COUNTY — PETITION PRESENTED.

January 12, 1827.

The petition of James McGlashan, of the county of Cattaraugus, praying to be admitted to a seat in this House in the place of John A. Bryan, the sitting member, was read and referred to the committee on privileges and elections.

Assembly Journal, 1827, page 173.

REPORT OF COMMITTEE.

February 26, 1827.

Mr. Mann, from the committee on privileges and elections, to whom was referred the petition of James McGlashan, praying to be admitted to a seat in this House in the place of John A. Bryan, the sitting member, from the county of Cattaraugus, reported: That the county of Cattaraugus is entitled to elect and return to this House one member; that it appears from a statement of the county canvassers, admitted to be correct, that at the last anni-

versary election three several candidates were voted for in said county for member of Assembly, to wit: the petitioner, James McGlashan, who had six hundred and fifty-eight votes; John A. Bryan, the sitting member, who had six hundred and sixty-one votes, and Joseph McClure, who had three hundred and sixty-five votes. In addition to the six hundred and fifty-eight votes given and canvassed for the petitioner, as aforesaid, he claims to have allowed one vote found in the Assembly ballot-box, in the town of Great Valley, on which was written "Jas. McGlash," for Assembly, or "Jas. McGlashan, for Sembly." It was satisfactorily proved by the affidavit of Charles Ward, supervisor, and Ira Norton and Daniel Farrington, inspectors of election of said town, and Richard Green, one of the poll clerks (documents herewith submitted, marked "A"), that an abbreviated or misspelled vote written in one of the forms above stated, supposed by them to have been intended for the petitioner, was found in the Assembly ballot-box, and rejected on account of some irregularity in the spelling of the surname or of the abbreviation of the Christian name. The deponents did not recollect with certainty in which of the forms above stated the name was written. Ira Norton thought it was "Jas. McGlash." It was also proved by the said affidavits that this vote was in the hand-writing of James Green, an elector of said town, and that it was the only written vote given for the petitioner in said town. It was also proposed to prove by affidavit of James Green that he gave to the inspectors and saw placed in the Assembly ballot-box such an abbreviated written vote, and that he intended said vote for the petitioner.

The committee are of the opinion that to go beyond the ballot-box to ascertain or search for the intention of the voter would be setting a precedent leading to consequences dangerous in its application.

The committee therefore decide that the vote was properly rejected for uncertainty, and ought not to be allowed.

It was also proved by the affidavits of Howard Peck, supervisor,

Nathan Follett, town clerk, and George Graham, an assessor, of the town of Yorkshire, there was but one box for receiving votes of Governor and Assembly which box was divided into two apartments by a partition; that on the morning of the last day of election, the box was placed upon the table in a different position than before, by changing ends; that the inspectors went on receiving, not aware of the altered situation of the box, and depositing the votes as if the box had remained as on the former days, until they had received ten or eleven votes, and then discovered they had misplaced the votes taken that morning, by putting the Assembly ballots in the Governor apartment, and the Governor ballots in the Assembly apartment, and on discovering the mistake, made a minute on the poll lists, then changed ends of the box and proceeded correctly, and on canvassing the votes, the number so misplaced agreed with the number of votes received that morning and noted on the poll lists, and were allowed. The petitioner contended that these six or seven votes found in the wrong box, ought not to have been allowed to the said John A. Bryan.

The committee, in order to decide upon the admission or rejection of the misplaced votes, in the town of Yorkshire, as well as other towns in this county, have perceived the necessity of adopting some general principle, by which they will be governed, in passing upon such votes. It will readily be admitted, that objections may be made to the application of any general rule, to a case of this description, and that the establishing of such rule is attended with difficulty. The committee, however, are of opinion, that when it clearly appears the error has occurred by the mistake of the inspectors, without the fault or carelessness of the voter, neither the elector nor candidate ought thereby to be deprived of his rights, but that such error should be corrected. But in case the error accrued from the negligence or fault of the voter, or where it did not appear affirmatively to have arisen from the mistake of the inspector, that it would not be safe or proper to attempt to correct such errors or faults, and the committee have, therefore, adopted

this rule as the least exceptionable criterion, in determining the admissibility of all such votes claimed on either side. In pursuance of this rule, therefore, the committee have decided that the six or seven votes misplaced in the town of Yorkshire, by the mistake of the inspectors, were properly allowed by these inspectors to the sitting member.

It was also proved, by the affidavit of Ezra Canfield, inspector of Little Valley, marked H, that during the election, an elector offered a vote which he said was a Congress vote, and which was put in the Congress box; the elector immediately after observed and offered to swear that he had mistaken his vote, and put his Assembly vote, which was for John A. Bryan, in the Congress box, whereupon the inspectors agreed that if one vote for John A. Bryan, for member of Assembly, should be found in the Congress box, it should be allowed to him; and that on canvassing, one such vote for John A. Bryan was found in the Congress box, and was canvassed and allowed to said Bryan.

The petitioner contended, and the committee decided, that this vote ought not to have been allowed to said Bryan.

The petitioner then claimed to have allowed to him ten votes found in wrong boxes, and not counted to him on canvassing, and to show himself entitled to such votes he proved, by the affidavit of Benjamin Clark, one of the inspectors of the town of Randolph, and marked B, that on canvassing the votes of that town one vote for James McGlashan, member of Assembly, was found in the Congress ballot-box; also one vote in the Governor ballot-box with the name of James McGlashan, member of Assembly, thereon; also one vote in the Governor's box with barely the name of James McGlashan thereon, without designating the office; also one for Timothy H. Porter, for member of Congress, in the Assembly box, and one vote in the same box for De Witt Clinton for Governor, which votes were returned as having been given for the offices distinguishing the boxes where they were respectively found, and of course the votes for the petitioner were not allowed to him as member of the Assembly on the canvass.

It was also proved, by the affidavit of Daniel S. Thorpe, marked C, that in the town of Cold Spring, in canvassing, two votes were taken from the Congress box having the name of James McGlashan thereon for member of Assembly; that one vote was taken from the Assembly box having the name of Timothy H. Porter for Congress thereon, which votes were not allowed, and that ninety-nine names appeared on the Assembly poll list; and it further appeared, from the statement of the county canvass aforesaid, that sixty-four votes were allowed to the petitioner and thirty-two to John A. Bryan for member of Assembly, making ninety-six votes canvassed from said town for member of Assembly,

It was also proved, by the affidavits of the supervisor and two of the assessors of the town of Perrysburgh, marked D, that two votes for James McGlashan for Assembly, and one for John A. Bryan for member of Assembly, were found in the Congress ballot-box, and three votes for Timothy H. Porter, member of Congress, were found in the Assembly ballot-box, and that the number of names on each of the poll lists of the said two boxes agreed with the number of votes found in each of the boxes respectively, and that the votes so found in wrong boxes were not allowed.

It was also proved, by the affidavit of George A. S. Crocker, supervisor of the town of Conewango, marked E, that in said town one hundred and fifty-one names appeared on the Assembly poll-list, and one hundred and fifty ballots found in the Assembly ballot-box, of which one hundred and twenty-three ballots were for James McGlashan, and twenty-six ballots for John A. Bryan, respectively, for member of Assembly, and one ballot for Timothy Porter for member of Congress; also that one hundred and forty names were found on the Congress poll list and one one hundred and thirty-nine ballots in the Congress ballot-box; also that two votes were found in the electoral ballot-box for James McGlashan for member of Assembly, and that all votes found in the wrong box were rejected.

It was also proved by the inspectors return for the town of Otto, and from an affidavit of John T. Ferris, Veni Plumb and Abel M.

Butler, inspectors of election of said town, marked F, that on canvassing one vote for James McGlashan for member of Assembly was found in the Congress box and not allowed to said McGlashan.

The committee are of opinion that inasmuch as it does not appear how or by whose mistake the said ten votes claimed by the petition were placed in wrong boxes, the said votes were properly rejected and ought not to be allowed to the petitioner.

And the committee further report, that on the part and behalf of the sitting member, it appears by the affidavit of the inspectors of election of the town of Great Valley, marked I, that three votes in that town were found in the Congress box in these words "Assembly, John A. Bryan," and an equal number of votes were found in the Assembly ballot-box for Timothy H. Porter for member of Congress, also in the Assembly box a ballot was found on which the name of John A. Bryan appeared twice, and also a vote supposed to be intended for John A. Bryan partly torn, on which the John was torn cross-wise of the name so that the words A. Bryan only were legible thereon, also that the poll lists and ballots agreed, all of which votes were rejected. It was also proved by the affidavit of Jeremiah York, an inspector of the town of Randolph, marked K, that on canvassing the votes in said town, two votes were found in the Assembly box rolled together in these words "Assembly, John A. Bryan," which were immediately destroyed and not allowed, and that the poll list outnumbered the ballots exclusive of those, two votes by one.

It was also proved by the affidavit of the inspectors of the town of Ellicotville, marked L, that on canvassing the votes in said town one vote was found in the Governor ballot-box, in these words "Assembly John A. Bryan," which vote was rejected. It appears, from the affidavits of Nicholas Berdine, Anson Gibbs and Abiel H. Stebbins, also marked L, that said Nicholas Berdine, an elector in said town, presented a vote for John A. Bryan, which was put in the Governor box by mistake of the inspector; that he immediately offered another vote for John A. Bryan, which was put in

the Assembly box. It was also proved by the affidavit of the inspectors of election of Farmersville, marked M, that on canvassing the votes in that town, one vote was found in the Congress ballot-box in these words "Assembly, John A. Bryan," and a vote in the Assembly box for Timothy H. Porter, member of Congress, and that the poll lists and votes were even; all these votes were rejected, and not allowed in the canvass.

The sitting member claimed to be allowed eight votes for those above stated to have been rejected by the inspectors, and one other vote for a ballot proved to have been rejected in the town of Perrysburgh, on account of its being found in the Congress ballot-box of that town; in all nine in number. But the committee are of the opinion that the said votes were properly rejected by the inspectors, and ought not to be allowed, with the exception of the vote found in the Assembly box, in the town of Great Valley, whereon the name of John A. Bryan appeared twice. A majority of the committee have decided that that ballot ought to be allowed as one vote for the sitting member. They see no good reason why it should be placed on the same footing with two separate ballots folded together, as in the case of the votes in the town of Randolph. There is not the same, nor indeed any danger of their imposing two votes on the inspectors in the place of one.

The petitioner also offered to prove, by sundry affidavits marked N, that in the town of Farmersville the inspectors of election were friendly to the election of the sitting member, and that one of them made a small bet with an elector during election that said Bryan would be the successful candidate. Also, that after the poll was closed, the inspectors retired to a different room from that in which the votes had been taken, for the purpose of canvassing, and locked themselves therein, with but two or three others known to be partial to the election of the said Bryan, and continued therein, refusing admittance to those without until they had finished canvassing the Assembly votes, when the doors were opened and the result proclaimed. Also, that during the election in said town,

one of the inspectors opened the Congress ballot-box and took therefrom a printed ballot and placed the same in the Assembly ballot-box. The last of these facts was proposed to be proven by the affidavits of Solomon Curtis, an elector not belonging to the board of inspectors, and John D. Older, one of the poll clerks; and the affidavit of the said Solomon Curtis further stated that the ballot so removed from one box to the other had the name of John A. Bryan printed thereon.

On the part of the sitting member is proposed to prove, by several affidavits marked O, that although the inspectors did canvass in a different room from the bar-room of the tavern where the votes were received, they did it publicly and fairly; that they were induced to retire from the said bar-room to avoid the noise, disorder and interruption to which they would have been exposed had they not so removed; that the door of communication between said canvassing room and the bar-room might have been fastened, through the prudence of a constable whose duty it was to keep order, but that there were two other doors in said retiring room, opening to the street, which were not fastened, and through which spectators were entering and departing at pleasure during the whole time they were canvassing to the number of from twelve to sixteen or more.

The petitioner contended that on account of such irregularities as he proposed to prove, the votes returned by the said town of Farmersville for the sitting member, which appear from the statements of the county canvass above referred to to have been sixty-three, ought to have been destroyed and not allowed to said Bryan.

The committee are of opinion that, inasmuch as no corruption is imputed, this impropriety of conduct on the part of the inspectors, if fully proved, as proposed, ought not to disfranchise the electors of said town. As to the vote said to be transferred from the Congress to the Assembly box, in Farmersville, the committee are of opinion that if the proof offered would fully establish the fact that the vote was for John A. Bryan, it ought to be rejected; but as

that proof is not satisfactory, the committee decide that it was improperly allowed.

In concluding this report, the committee add the following result:

That by rejecting one vote allowed to Mr. Bryan by the inspectors in Little Valley, and allowing one vote for him rejected in the town of Great Valley, the whole number of votes allowed to him remain the same as on the county canvass, to wit, six hundred and sixty-one; and by rejecting all the votes claimed by the petitioner, his number will also remain the same as returned by the county canvassers, to wit, six hundred and fifty-eight, leaving a majority for Mr. Bryan of three votes; and, by allowing the votes rejected by the inspectors for each of the candidates, the sitting member will still have a majority of one. The committee, therefore, offer the following resolution:

Resolved, That the prayer of the petitioner ought not to be granted.

Ordered, That the said report be committed to a committee of the whole House.

Ordered, That the usual number of copies of the said report be printed for the use of the Legislature.

Assembly Journal, 1827, pages 670, 671, 672, 673, 674. Further proceedings, page 714.

COMMITTEE OF THE WHOLE — JOHN A. BRYAN RETAINS HIS SEAT.

March 6, 1827.

The House resolved itself into a committee of the whole, on the report of the committee of privileges and elections, on the petition of James McGlashan, of the county of Cattaraugus, praying to be admitted to a seat in this House, in the place of John A. Bryan, the sitting member, and after some time spent thereon, Mr. Speaker resumed the chair, and Mr. Hamilton, from the said committee, reported, that in proceeding on the said report, the committee had

agreed to the resolution reported by the said committee, which he was directed to report to the House, and he read the same in his place and delivered it at the table, where it was again read, in the words following, to-wit:

Resolved, That the prayer of the petitioner ought not to be granted.

Mr. Speaker put the question, whether the House would agree to the said resolution, and it was determined in the affirmative.

Ayes, 71. Nays, 13.

Assembly Journal, 1827, page 720.

Case of S. Sidney Breese and Lewis Parker.

ONEIDA COUNTY.

IN ASSEMBLY, *January 3, 1828.*

Petition of S. Sidney Breese presented.

Assembly Journal, 1828, page 21.

IN ASSEMBLY, *January 4, 1828.*

REPORT OF COMMITTEE — S. SIDNEY BREESE AWARDED THE SEAT.

Mr. Edgerton, from the committee on privileges and elections, to whom was referred the petition of S. Sidney Breese, of the county of Oneida, claiming a seat in this House, in the place of Lewis Parker, the member returned, reported:

That the committee having investigated the subject committed to their charge, find the following facts clearly substantiated, which are in accordance with the prayer of the petitioner:

First, that S. Sidney Breese was a candidate for the office of member of Assembly in and for the county of Oneida, at the last annual election, held on the fifth, sixth and seventh days of November last. At which election, from the documents furnished the committee and from the returns of the county board of canvassers, it fully appears that two thousand nine hundred and eighty-

five votes were given and allowed to the said S. Sidney Breese, from twenty-one towns out of twenty-four of which the county of Oneida is composed. It appears that in the three remaining towns, viz., Verona, Vienna and Paris, five hundred and nine votes were given for *Sidney S. Breese*, *Samuel S. Breese* and *Samuel Sidney Breese*, all of which were rejected by the board of county canvassers, and by them considered as scattering votes.

If the intention of the electors, in giving their votes, were the criterion by which the canvassers were to be governed, the committee would be of the opinion that the board erred in their rejection. But the affidavits of three of the inspectors of the town of Verona show that two hundred and eighty-six votes in that town were in truth and in fact given for S. Sidney Breese, the true name of the petitioner; and by a mistake in the town inspectors returned to the county board for Sidney S. Breese. The error therefore lies with the town inspectors, and not with the county board.

It further appears, by the affidavits of two of the inspectors of the town of Paris, that eighty-four votes were given for S. Sidney Breese, the right name of the petitioner; but by a mistake in the town inspectors in making their return they were returned for *Samuel S. Breese*.

It further appears, by the affidavits of three of the inspectors of the town of Vienna, that one hundred and thirty-seven votes were given in that town for S. Sidney Breese, and by a similar mistake returned to the county board as for *Samuel Sidney Breese*.

In addition to these conclusive facts is subjoined the letter of Linas Parker, who holds the certificate of election as member of Assembly from that county, marked No. 6, to which the committee beg leave to refer; which states that he shall not claim the seat to which his certificate entitles him, without he legally and equitably ought to hold it; which letter is in the words following, to wit:

VIENNA, November 21, 1827.

DEAR SIR — Your son informs me you intend to claim the seat in the Legislature of this State for which I have the certificate.

It would be very unpleasant for me to contend with any man in this case, and more particularly with one with whom I have no reason to be otherwise than on the most friendly terms. But it would give me extreme pain if I believed any person with whom I am acquainted should be so uncharitable as to believe I wished to occupy a seat in the Legislature of this State to which I am not legally and equitably entitled.

Therefore, my present impression is, that I shall not presume to dispute your claim. If, upon reflection, I should think otherwise, I will give you timely notice.

With the highest esteem, your obedient servant,

L. PARKER.

S. SIDNEY BREESE, Esq.

Other facts, which the committee deem immaterial in this case, might be detailed to the House; but they are unwilling to take up the time of the House further than to submit the following state of the case:

It appears that S. Sidney Breese received in twenty-one towns, two thousand nine hundred and eighty-five votes; Sidney S. Breese, two hundred and eighty-eight votes; Samuel S. Breese, eighty-four votes, and Samuel Sidney Breese, one hundred and thirty-seven votes; making in the whole, three thousand four hundred and ninety-four votes, to which the petitioner is legally entitled, in the opinion of the committee.

Lewis Parker received three thousand three hundred and eighty-three votes, leaving a majority of one hundred and nine votes in favor of the petitioner.

The committee, therefore, beg leave to submit for the consideration of the House, the following resolutions:

Resolved, That Lewis Parker is not entitled to a seat in this House.

Resolved, That S. Sidney Breese is entitled to a seat in this House; thereupon,

Resolved, That Lewis Parker is not entitled to a seat in this House.

Resolved, That S. Sidney Breese is entitled to a seat in this House.

Thereupon, Mr. S. Sidney Breese, a member of Assembly, elected in and for the county of Oneida, appeared in the Assembly Chamber, was duly qualified and took his seat.

Assembly Journal, 1828, pages 26, 27, 28.

Case of Daniel W. Bostwick and Septimus Evans.

SENECA COUNTY — PETITION PRESENTED.

IN ASSEMBLY, *January 8, 1829.*

The petition of Daniel W. Bostwick, of the county of Seneca praying to be admitted to a seat as a member of this House from said county, in the place of Septimus Evans, the sitting member, together with the accompanying documents was read and ordered to be laid upon the table.

Assembly Journal, 1829, page 26.

REPORT OF COMMITTEE — DANIEL W. BOSTWICK AWARDED THE SEAT.

IN ASSEMBLY, *January 26, 1829.*

Mr. Edgerton, from the committee on privileges and elections, to which was referred the petition of Daniel W. Bostwick, of the county of Seneca, praying to be admitted to a seat in this House, in the place of the Honorable Septimus Evans, the sitting member, with the accompanying documents, reported:

By the official certificate of the board of county canvassers of the county of Seneca, on file in the office of the Secretary of State, a copy of which has been furnished the committee, it appears that at the last annual election, held in the said county, on the third, fourth and fifth days of November last, the Hon. Septimus Evans received one thousand five hundred and fifty-nine, and the petitioner, Daniel W. Bostwick received one thousand five hundred

and fifty-eight votes, giving the sitting member a majority of one vote.

The petitioner claims to have allowed to him four votes, given in the town of Junius, in said county, which were rejected by the inspectors of election in said town, on the canvass of the votes. The four votes claimed by the petitioner, are of the following description: Two votes for Dan'l W. Bostwick, one vote for Daniel Bostwick, and one vote for D. W. Bostwick.

The said four votes, as above named and abbreviated, were found in the proper box for the office of Member of Assembly.

In support of the prayer of the petitioner, the affidavit of Henry Moses, supervisor of the town of Junius, has been furnished the committee, which fully shows the facts above stated, and also that the said four votes were not allowed by the town inspectors in canvassing the votes of said town, but were wholly rejected.

It further appears by the affidavit of the said supervisor, that the four votes above mentioned and described were not preserved, nor copies of the same kept or sent to the county clerk of said county, or preserved in the office of the town clerk of the town of Junius; but that the same were destroyed on the evening of the fifth day of November, at the time the votes of the town of Junius were canvassed.

It further appears by the affidavit of the said supervisor, that, on canvassing the votes of said town at the time above mentioned, the said inspectors of election found a ballot in the box appropriated for Congress and electors in the words following: Daniel W. Bostwick and Erastus Woodworth, which said ballot was headed, labelled or indorsed "for Members of Assembly," and that the said ballot was not counted or estimated by the said canvassers for or in favor of any person whatever, nor was the same preserved, or a copy of the same; nor was the said ballot estimated or returned to the board of county canvassers, the said supervisor having been one of the said board of county canvassers.

It also further appears from the affidavit of the said supervisor,

that he has resided in the county of Seneca for the last twenty years past, and that he does not know nor has he heard of any other person residing in the county of the name of Bostwick, except Daniel W. Bostwick, the name of the petitioner, who was a well-known candidate for the office of member of Assembly, regularly nominated in the years 1827 and 1828.

In support of the allegations of the petitioner, it further appears by the affidavit of Robert Sloan, one of the assessors of the town of Junius, and also one of the board of inspectors of election in said town, that, on the canvass of the votes of the said town, there were several scattering and abbreviated votes found in the box appropriated for ballots for members of Assembly which were not counted or allowed to Bostwick, but were rejected. He also further states that he recollects, on the canvass of the ballots of members of Congress and electors, one vote was found in the box appropriated to that purpose on which was printed or written the names of Erastus Woodworth and Daniel W. Bostwick; which ballot or ballots were not canvassed or estimated for either of the said persons who were candidates for members of Assembly, and that neither of the votes so found in either of the boxes for members of Assembly was allowed or preserved; but that the same were rejected and destroyed, and the same were not returned to the board of county canvassers, or copies of the same taken or preserved in the office of the town clerk of the town of Junius.

It further appears, by the affidavit of the said assessor, that he has resided in the said town of Junius for many years, and that he does not know of any person of the name of Bostwick, except Daniel W. Bostwick, the name of the petitioner.

The petitioner has also furnished the committee with the affidavit of John Ingersol, town clerk of the town of Lodi, in said county, and one of the inspectors of election in said town, at the late election, who states, that on the canvass of the votes of said town, on the fifth day of November last, there was found in the proper box a printed ticket or ballot, indorsed "for members of

Assembly," in which the words, letters and parts of letters were found following: Ianiel W. Bostwick on it, with the names of the other candidates for the county offices, viz.: One member of Assembly, sheriff, clerk and coroners. All the said ticket or ballot was estimated and counted, except the name of the said Ianiel W. Bostwick, which was rejected by the said board of town inspectors, and not allowed to Daniel W. Bostwick, in any way or manner, or was the same preserved, or a copy of the same.

The said affidavit further states, that the said ballot or ticket appeared to have been torn or worn in such manner, as to have taken off the part of the said printed D, which formed the half circle of the same; which said part of the letter D would have made the entire name of Daniel W. Bostwick, the petitioner, and who was a candidate for member of Assembly in said county, at the last election.

In support of the claim of the petitioner is also presented to the committee the affidavit of John G. Tubbs, one of the assessors of the town of Junius, in said county, and who was one of the inspectors of election in said town, at the last annual election; who states, that on canvassing the votes of the said town, on the last day of the election, on the fifth day of November, he read, in the hearing of the inspectors of said election, and the clerks of the polls, the scattered and abbreviated votes mentioned in the affidavit of Henry Moses, supervisor of said town, and after reading the same, he passed the said abbreviated votes to the said supervisor. The affidavit further states that he, the said John G. Tubbs, distinctly recollects the four abbreviated votes, mentioned by the said supervisor, and before described, and that they were of the following description, namely: Two votes for Dan'l W. Bostwick, one vote for Daniel Bostwick, and one vote for D. W. Bostwick, all found in the proper box, and indorsed and designated according to the statute regulating elections. The affidavit further states, that in canvassing and estimating the votes of said town, the said votes so abbreviated were all rejected by the board, and not estimated or

counted for the petitioner, or any other person, nor were the said ballots or tickets preserved, or a copy of the same, or any account or memorandum made thereof, at the said canvass; nor were the same returned to the board of county canvassers, to the clerk of the county, or the clerk of the town of Junius.

The affidavit further states that there was found, in the Congress and Electoral box one vote for Daniel W. Bostwick and Erastus Woodworth, which was also rejected, and not estimated, counted or preserved by the said board of town inspectors.

The affidavit also states that there is no other person in the county of Seneca of the name of Bostwick except the petitioner, who was a candidate for member of Assembly at the last election held in the county of Seneca.

The committee have now presented to the House the facts and proof of those facts as alleged on the part of the petitioner, and as set forth in the affidavits accompanying the petition. While upon this part of the subject which has been before the committee, they beg leave to remark, that by the forty-fourth section of the fourth article of the fourth title of the first part of the Revised Statutes, it is provided that no ballot, properly endorsed, found in a different box from that designated by its endorsement *shall be rejected*, but shall be counted in the same manner as if found in the proper box; which provision the committee are compelled to say was wholly overlooked or disregarded by the inspectors of election in the town of Junius, as far as relates to the ballot found in the Congress box, given for member of Assembly. It is with regret that the committee are obliged to notice this culpable want of attention to the law under which they acted. By the fifty-second section of the same article of the statute, it is provided "that it shall be the duty of inspectors of election to preserve a true copy of all ballots rejected as defective, with the originals attached, and deliver the same to the town clerk, to be filed in his office;" which salutary and necessary provision, as the committee believe, was totally disregarded by the inspectors of the said town of Junius, if the facts

stated in the affidavits of three of said inspectors are to be taken as true. A rigid and strict compliance with the statute in conducting elections your committee believe to be essential; and the reason for it are so numerous and manifest that they need not be suggested, but as a provision to save the trouble of an application to this House, when the objects would be accomplished at the board if they did their duty. On the part of the sitting member, who with the petitioner have both been before the committee, and two weeks allowed to procure additional proof as to the validity of his election, he has furnished the committee the following facts and affidavits:

First, The affidavit of the town clerk of the town of Junius, who swears that he has searched the office of that town, and that there is no return to that office of rejected votes for members of Assembly on file in said office.

The committee are also furnished with an affidavit on the part of the sitting member, from Samuel Bradley, one of the assessors of the town of Junius and one of the board of inspectors of said town, and who states the facts that two abbreviated votes were found in the proper box, of the same description as described by Henry Moses, the supervisor of said town, which were rejected by the board and not allowed or preserved. He further states that he has no knowledge nor does he believe that any other ballot or votes were found in the proper box that were not counted or estimated to the petitioner. And he further swears that there was no ballot found in the Congress box which was not counted or estimated for the petitioner according to the best of his knowledge or belief. The said affidavit further states that there was a memorandum made of the defective and rejected votes at the time of the canvass and estimate of the votes of said town; but that the same is now lost or mislaid; and that the amount of the votes on said memorandum was as is stated in his affidavit.

It is further made to appear to the committee, by the affidavit of the town clerk of the town of Fayette in said county, that there is on file in said office a vote rejected by the board of inspectors in said town, on which is written the name of Sep't Evans, which

vote the committee have allowed to the sitting member, on the ground that it is the common and accepted abbreviation of the name of Septimus, the Christian name of the sitting member, and as there is no other person in said county of the name of Evans except Septimus Evans, one of the sitting members of this House from the county of Seneca.

The facts stated in the affidavit last referred to are fully corroborated by the affidavit of Enoch Chamberlain, supervisor of the town of Fayette.

The committee have now gone through thus minutely with the proofs and allegations touching the subject before them, and in coming to a conclusion they will briefly state their unanimous opinion.

1. The committee have allowed the four votes described in the affidavit of Henry Moses, the supervisor, and as proved by two other of the inspectors of said board.

2. The vote found in the Congress box should have been allowed to the petitioner, because the forty-fourth section of the election law is imperative upon the board.

3. The vote of the town of Lodi, which was rejected, should have been allowed to the petitioner.

4. The committee have allowed to the sitting member one vote which was rejected in the town of Fayette, for the reasons heretofore given, that it was the common and accepted abbreviation of the name.

The result therefore will stand: That by allowing to the petitioner five additional votes, added to the one thousand five hundred and fifty-eight, will make one thousand five hundred and sixty-three.

Allowing to the sitting member one additional vote will make one thousand five hundred and sixty.

In which opinion your committee believe they are sustained by the rules heretofore adopted by this House upon similar applications, and also by the State canvassers and by the Supreme Court. They therefore beg leave to submit the following resolutions:

Resolved, That the seat of the Honorable Septimus Evans, the sitting member of this House, be vacated,

Resolved, That the petitioner, Daniel W. Bostwick, be admitted as a member of this House, as duly elected from the county of Seneca, in the place of the Honorable Septimus Evans, the sitting member.

Ordered, That the said report and the resolutions be committed to a committee of the whole House.

Ordered, That the usual number of copies of the said report be printed for the use of the Legislature.

Assembly Journal, 1829, pages 168, 169, 170 and 171.

COMMITTEE OF THE WHOLE.

IN ASSEMBLY, *January 29, 1829.*

The House then resolved itself into a committee of the whole, on the resolutions reported by the committee on privileges and elections on the petition of Daniel W. Bostwick, praying for admission to a seat in this House, as a member, from the county of Seneca, in the place of Septimus Evans, the sitting member; and after some time spent therein, Mr. Speaker resumed the chair, and Mr. Paige, from the said committee reported, that the committee had agreed to the said resolutions, in the words following, to wit:

DANIEL W. BOSTWICK AWARDED THE SEAT.

Resolved, That the seat of the Hon. Septimus Evans, the sitting member of this House be vacated.

Resolved, That the petitioner, Daniel W. Bostwick, be admitted as a member of this House, as duly elected, from the county of Seneca, in the place of the Hon. Septimus Evans, the sitting member.

Which he was directed to report to the House, and he read the report in his place and delivered the same in at the table, where it was again read, and agreed to by the House.

Thereupon, Mr. Bostwick, declared to have been duly elected a

member of this House in and for the county of Seneca, appeared in the Assembly Chamber.

MR. BOSTWICK TAKES THE OATH OF OFFICE.

Ordered, That Mr. Edgerton and Mr. Efner attend with Mr. Bostwick before some proper officer and see him duly qualified.

Mr. Edgerton reported, that pursuant to the order of the House, Mr. Efner and himself had attended with Mr. Bostwick before Azariah C. Flagg, Secretary of State, and seen him duly qualified.

Ordered, That Mr. Bostwick do take his seat.

Assembly Journal, 1829, page 318.

Case of Calvin Wheeler and Harvey Granger.

SARATOGA COUNTY — PETITION PRESENTED.

[See Appendix E, Assembly Journal, 1829.]

IN ASSEMBLY, *January 17, 1829.*

The petition of Harvey Granger, of the county of Saratoga, setting forth that fraudulent proceedings were had at the polls of the election in the town of Greenfield, in said county, and praying to be admitted to a seat in this House, was read and referred to the committee on privileges and elections.

Assembly Journal, 1829, page 93.

REPORT OF COMMITTEE IN FAVOR OF MR. GRANGER.

IN ASSEMBLY, *January 30, 1829.*

Mr. Edgerton, from the committee on privileges and elections, to which was referred the petition of Harvey Granger, of the county of Saratoga, and the petition of sundry inhabitants of the town of Greenfield, in said county, together with the accompanying documents, reported:

The committee, in the investigation of the subject committed to them, have endeavored to bestow upon it that consideration which its merits so imperiously require.

The petitioner, Harvey Granger, prays to be admitted to a seat

in this House as a member of Assembly, duly elected from the county of Saratoga. In assigning the cause why the petitioner should be entitled to a seat, he alleges that fraud or gross negligence is chargeable to the inspectors of election, in the town of Greenfield, in said county; and which, if not corrected is calculated to destroy all confidence in the purity of elections and prostrate the sovereignty of the people.

The petitioner further states, that it will appear by the affidavits and documents presented with his petition, that at the late annual election held on the 3d, 4th and 5th days of November last, by the certified canvass of the votes of the town of Greenfield, by the inspectors of election in said town, that Howel Gardner, the candidate for the office of elector for President and Vice-President at said election, in said town, received one hundred and eleven votes for said office.

Whereas by the affidavits of one hundred and seventy-two electors of that town, it appears that the said Howel Gardner received one hundred and seventy-two votes for the office of elector. From which facts the petitioner avers that it is manifest that the inspectors of said town have wickedly and corruptly taken from the ballot-box appropriated for receiving the ballots of such election sixty-one votes; or they have so negligently and carelessly kept the said box as to suffer some other evil-minded and wicked citizen to perpetrate the said fraud; and prays that the same may be inquired into by this House.

Accompanying the petition is referred to the committee, also, the petition of twenty-eight of the inhabitants of the town of Greenfield, praying legislative inquiry as to the allegations stated by the petitioner.

In support of these declarations and allegations of the petitions, are presented the affidavits of one hundred and seventy-two persons, who swear positively to the fact, that they at the late election in said town, voted for Howel Gardner, for elector of president and vice-president. One hundred and fifty of the persons so sworn or

affirmed, have subscribed or taken an oath or affirmation before Judiah Ellsworth, a commissioner, etc., in the words following, to wit:

SARATOGA COUNTY, ss.:

“The following persons, whose names are hereunto subscribed, being severally sworn or affirmed, depose and say that they did, each one for himself, during the election held in the town of Greenfield, in said county, on the third, fourth and fifth days of November last, present and deliver to the board of inspectors of said election, a paper ballot, containing the name of Howel Gardner for elector, which said ballot was received by the said board, to be inserted in the ballot-box.”

Of the residue of the one hundred and seventy-two persons, so sworn or affirmed, it appears that fourteen of the number took and subscribed before Charles Deake, Esq., a commissioner, etc., an oath or affirmation, of the import and substance as above recited; and several other affidavits taken before other individuals, of the same amount.

From the state of the case here presented, the committee considered themselves imperiously required to apply to the House to send for persons and papers for a further investigation of the matter they had in charge. That power having been granted by the House to the committee, the chairman, in pursuance of the order of the committee, issued a summons for each of the inspectors of election in the town of Greenfield, viz.: Jonathan Lapham, supervisor; Solomon Dake, town clerk; and Silas Gifford, Henry Miller and Adam Bockes, Jr., assessors of said town.

They also issued, at the request of the delegation from the county of Saratoga, a like summons for Salmon Childs, Charles Deake, John Prior, Elihu Wing, and also issued, at the request of the petitioner, a summons for Seth Hewitt and Judiah Ellsworth, which was duly served by the sergeant-at-arms of this House. And, in pursuance of the notice so given, each of the persons named in the summons appeared before the committee, and was sworn and ex-

amined, except Seth Hewitt, who attended, but was not sworn or examined.

From the testimony of the inspectors, it fully appeared that the election in the said town of Greenfield was properly conducted. The inspectors uniformly stated that the usual care was taken of the ballot-boxes during each adjournment of the polls.

That a slip of paper was fastened over the hole in the lid of the boxes, by wafers, and also over the key-hole, and that the boxes were returned at the opening of the polls, after each adjournment, in the same situation.

The inspectors also testified that two nights of the election the ballot-boxes were kept by Solomon Dake, the town clerk, and the keys of the boxes kept by some one of the board.

They also state that one night during the election, the ballot-boxes were kept by the supervisor, and the keys by one of the assessors.

The supervisor testified that during the night he had the custody of the boxes, they were locked up in a chest in the house in which he lives.

Solomon Dake, the town clerk, testified, that the two nights the said ballot-boxes were in his possession, they were kept in his store, locked by himself in the evening, the key taken into his dwelling-house and hung up. And that during one or both of the evenings which the boxes were in his store, there were a number of people in and about his store on business, and that he was in and out of the store for short periods of time, and thinks it impossible for any one to have interfered or meddled or opened the said boxes without his knowledge.

The town clerk also testified, that during the three days of election, he had a clerk who attended his store, but slept in his dwelling-house; and that on one of the mornings of the election, his clerk went to the store before him, and was opening the window shutters when he went to the store, and thinks he could not have been there more than five minutes before him. The boxes re-

mained in his store each morning until he started for election; and he was in and out every few minutes, and no one could have robbed the boxes without his knowledge.

The clerk whom he employed during the election stayed but four days; lives in the town, and is a young man of fair character and good reputation.

The said town clerk further stated to the committee, that Alvah Dake, in his presence, said that the election in the town of Greenfield would be destroyed or set aside; and that he, the said Alvah Dake, would procure some one to vote twice, or get some illegal votes; and that he, the said Alvah Dake, would cause the said election to be lost; and that these threats were made before the election and during the time of the election; and that he, the town clerk, cautioned the board of inspectors to be careful, for such threats were made; and that they were more than usually careful in conducting the election in that town.

The town clerk also testified that a short time after the election a number of persons were collected at his store and a conversation was held upon the subject of the late election and the loss of votes claimed for the Jackson elector. The ballot-boxes were then in his store as they had been during the time he had held the office of town clerk, which was since April last; and after examining the locks to the ballot-boxes, one key would open four of the boxes; that a part of the boxes were secured by a small chest or trunk lock, and the others by means of small brass padlocks. He also states that he had been in partnership with Alvah Dake the season past, in the store, but that they had dissolved, and had never had any difficulty; was no quarrel or ill-will existing between them, previous to this time, to his knowledge. All the inspectors concur in opinion that the election was conducted with more than ordinary caution.

Salmon Childs testified that he is acquainted with all the inspectors of said town, and that they are entitled to the confidence of all who reside in that town, and that Solomon Dake, the town clerk, is an upright and industrious young man.

Judge Childs testified that he had known most of the inspectors many years, and had perfect confidence in them all.

See report of committee, Assembly Journal, 1829, pages 324 and 325, for further testimony as to character of inspectors; also affidavits Nos. 1 to 11 in appendix C and D, in said Journal.

The certificate of the town canvass has been furnished the committee, from which it appears that Howel Gardner, at the late election in the town of Greenfield, received one hundred and eleven votes, to which certificate they beg leave to refer, marked No. 12, Assembly Journal, 1829, appendix "C."

The official canvass also, of the county, has been furnished the committee, marked 12, Assembly Journal, 1829, appendix "C," to which the committee beg leave also to refer the House.

The committee have had suggested to them several expedients to arrive at the truth in the investigation of this matter, but they could not be fully convinced as to their propriety. It has been suggested to the committee to institute a commission to go into the town of Greenfield to take the deposition of all the voters in said town.

The committee, however, thought this course objectionable.

It has also been under consideration before the committee whether they could allow evidence to come before them to impeach the credibility of the affidavits submitted, inasmuch as that course would involve a protracted and irritating inquiry as to the credibility of the witnesses who have been adduced by both parties. And as the technical rules of legal evidence are extremely perplexing in an investigation of this description, to refuse to hear any evidence that might be offered, would be a denial of justice to the parties interested.

The committee have gone thus far in giving a concise view of the features of the case about to come before the House.

They cannot, however, forbear to remark, that they have earnestly labored to look at the subject before them divested of all its party coloring and stripped of all its extraneous circumstances. They are aware that feelings of a nature not the best calculated to

develop the real merits of the question in issue between the petitioner and those accused may have had an influence in forming a judgment; but if such feelings have existed, the committee are unconscious of their bias or control on this occasion.

What, then, is the point in issue? A highly respectable and respected citizen charges the inspectors of election, equally respectable and respected, with fraud, corruption or gross negligence in the discharge of important solemn official duty. Nothing less is involved in this question than the purity of our elections, or the final and fatal overthrow of all that is valuable and all that is dear to the heart of a freeman in this great, this prosperous and happy republic. If the choice of our rulers is to be wrested from us by corruption of our inspectors of election at the ballot-boxes, well may we be alarmed, and as sentinels and as guardians of the birth-right for which our fathers pledged before the world their "lives, their fortunes and their sacred honors," we are bound to take warning. If, on the other hand, the character, the integrity, the purity of our public officers is to be assailed by the rude assaults of party animosity and political strife, then farewell to our boasted institutions, our civil rights, if not summarily and speedily redressed:

No reprehension can be too severe, and scarcely any punishment too rigorous, if the inspectors of this board of election are guilty of that with which they are charged. No sentence within the range of our penal code would scarcely be too hard for men who would conspire to destroy the character of this board of inspectors, by asserting that to be true which they knew to be false, while in the discharge of official duty.

The committee have found great embarrassment in attempting to arrive at reasonable certainty upon the case before them. From the peculiar nature of the points in issue, and being without example or precedent to guide them in their labors, as far as legislative authority is concerned, they have hesitated and have forborne to express their own opinions but with extreme diffidence.

Will corruption, if brought home to one box in the election in

question, vitiate and destroy the remaining ballots found in other boxes, when all are included in the same certificate of the inspectors? The committee are aware that a sort of legal maxim exists, that bad in part bad as a whole. Has this House the authority to invalidate the election of a member of this House because improper conduct or corruption has tainted the election of another and distinct officer of the government, although voted for at the same election? Would corruption, in the election of a justice of the peace at the election in question, have deprived a member of this House of a seat here who held the official certificate, had such corruption, fraud, or gross negligence, been proved beyond the power of contradiction? These and many other questions of a similar nature and like import, every member of the House will readily perceive can be put.

From the detail of the evidence, a subject of all-pervading interest in an elective government, it appears that the oaths of more than sixty witnesses contradict the certificate of the inspectors as to a part of the facts attested by that certificate.

If this great number of witnesses inform the committee truly, it will at least give the character of direct falsity to some parts of the certificate and of doubtful certainty to all the rest of it, and places the evidence to be derived from that certificate in a situation similar, in the opinion of the committee, to that of a witness in a court of justice who should testify to several material facts, on one of which the material points of his testimony should be fully proved to be wholly destitute of truth. In the absence of all other evidence, a court of justice, as the committee apprehended, would not permit the rights and interests of a party to be affected or compromised by testimony so tainted and invalidated, especially if that departure from truth be of such a complexion as to evince design and impure intention. The inspectors have been allowed, and that too very properly, by the committee, when their official acts were directly drawn in question, to purge themselves and their conduct by their own testimony, subject, however, in the opinion of the committee,

to the caution which should attend the reception of testimony or evidence from such a quarter. And, it is to be observed, that the scope of their testimony is directed to the exclusion of the fact, that their certificate contains anything but the real truth and particularly denies that any person or persons but themselves, or one or more of them, could have the means of altering the ballots in the boxes. The town clerk particularly states that he heard (before the election) threats of destroying the election of that town; extraordinary as it might seem that any person of sound intellect should deal in such threats, as all such threats must have lacked power to change ballots in the ballot-boxes, honestly, safely and exclusively kept by the inspectors themselves, and that too while they had the power to determine what ballots should be received.

This part of the testimony might well have suggested the reflection to the committee that it is well adopted to provide a coloring for the serious apprehensions as to the nature of the events that have alarmingly happened, if we give credit to the sixty witnesses to the fact that the ballot-boxes were sifted of their contents. Words alone, without the use of more prevailing and seducing means, could never open the ballot-boxes, or change the contents. And yet this has been done, provided the testimony of more than sixty electors of that town may be safely credited.

Again, the committee will observe that the investigations which have been had, the collection of the evidence, and the proceedings in the town to present the case to this House, have been open and public, with previous notice in the public newspapers, thereby affording opportunity to discredit, or throw doubts on the testimony of the electors who stand arrayed by their oaths against the inspectors. Opportunity, however, will be afforded, the committee hope (if such is wanted and can be had), to invalidate their testimony or destroy their credibility, if practicable, and put this subject in its true light.

The case is peculiar, as the committee have before remarked, and is distinguished, in its leading features, from any other that has

ever came before this House. If there is wrong here, it is wrong by design, and can scarcely be attributed to accident, mistake or honest error of judgment. Whether it is within the province of the committee to look for or designate the persons or person who have done the alleged mischief, and committed so flagrant an outrage upon the rights of electors, which, if tolerated or permitted to escape the most rigorous reprehension within the power of the House, would endanger the whole fabric of elective government, and strike a deadly blow at the most sacred rights of a free people, is what this House must determine. Fraud, or even uncertainty in the returns of elections, is death to the liberties of our constituents.

If the canvass of the votes in the town in question is deprived of the certainty which the inspectors' certificate imports, the committee know of no mode, within the constitutional power of this House, to restore it to certainty. But we can so far protect the purity of our own body as to permit no seat therein to be holden on the strength of a certificate that is false or fraudulent, in whole or in part; and if a certificate is found to be false in part, it would be unreasonable to presume, without some redeeming certainty, that it is true in the other part. If there is fraud, corruption or gross negligence in the ballot-box in question, it would taint the whole election of the town; and the gangrene limb must be amputated, and to be effectual it must be entire. The example and tendency of giving credit to a false certificate would be more dangerous, in the opinion of the committee, to the rights of suffrage, than its total rejection. Amid the regrets occasioned by the painful duty imposed upon the committee, of considering even a supposed case of fraud and corruption at all, they find a consolation in its happening at a time when (as far as this House is concerned) no object can be desired or aimed at but a faithful support of the great principles on which depends the safety of all our rights and institutions.

In conclusion the committee feel compelled to entreat the pardon of this House for the great length of their report which nothing but the magnitude of the question involved could have justified. It,

however, is due to the House to state, that the committee are not unanimous in the resolutions which they now submit to the House:

Resolved (as the sense of this House), That they are satisfied that fraud or corruption has been practiced upon the ballot-box for electors and member of Congress, at the late election in the town of Greenfield, in the county of Saratoga; but they have not conclusive evidence that such fraud or corruption was practiced by the consent or with the knowledge of the board of inspectors of said town.

REPORT THAT ELECTION IS VOID.

Resolved (as the sense of this House), That the election in the town of Greenfield is void and of no effect, and that the prayer of the petitioners ought to be granted.

(For the documents alluded to in this report, see Assembly Journal, 1829, Appendix C.)

Ordered, That the said report and resolutions be committed to a committee of the whole House.

Ordered, That the usual number of copies of the same be printed for the use of the Legislature.

Assembly Journal, 1829, pages 322 to 327.

IN ASSEMBLY, February 7, 1829.

Report, affidavits, etc., re-committed to the committee.

Ordered, That the report of the committee on privileges and elections, on the petition of Harvey Granger, of the town of Greenfield, in the county of Saratoga, praying to be admitted to a seat in this House, as a member of Assembly from said county, together with the petition of the inspectors of election of said town of Greenfield, praying that a commission may be granted, for the purpose of obtaining testimony in relation to frauds alleged to have been committed in that town, at the late annual election, and the accompanying affidavits, be re-committed to the committee on privileges and elections.

Assembly Journal, 1829, pages 395, 396.

SECOND REPORT OF COMMITTEE.

IN ASSEMBLY, *February 11, 1829.*

Mr. Edgerton, from the committee on privileges and elections, to which was re-committed the petition and documents relating to the election in the town of Greenfield, reported:

That they have had again under their consideration the subject, and the additional documents submitted to them, and see no reason to alter their former report on the same subject.

COMMITTED TO COMMITTEE OF THE WHOLE — MADE SPECIAL ORDER.

Ordered, That the said report and documents be re-committed to committee of the whole, and that the same be the special order of the day for Monday next.

Assembly Journal, 1829, page 409.

For documents, petitions, etc., see Appendix D; Assembly Journal, 1829.

IN ASSEMBLY, *February 19, 1829.*

REPORT CONSIDERED.

The House then proceeded to the consideration of the report of the committee of the whole, on the resolutions reported by the committee on privileges and elections, on the petition of Harvey Granger, praying admission to a seat in this House, as a member duly elected in and for the county of Saratoga; the said report being that the committee had agreed to a resolution in the words following, to wit:

Resolved, That the prayer of the petitioner ought not to be granted.

REPORT AMENDED.

Mr. Savage made a motion that the House should agree to amend the said report, by inserting immediately preceding the said resolution, a resolution in the words following, to wit:

Resolved (as the sense of this House), That they have reason to believe that fraud or corruption has been practiced upon the ballot-box for Elector, and Member of Congress, at the late election in the town of Greenfield, in the county of Saratoga; but they have not conclusive evidence that such fraud or corruption was practiced with the consent or with the knowledge of the board of inspectors of said town, or that any fraud was practiced upon the Assembly box.

Debate was had upon the said motion of Mr. Savage; and the question being put whether the House would agree thereto, it was determined in the affirmative.

Ayes, 66. Nays, 44.

Thereupon, Mr. Edgerton made a motion that the House should agree to amend the resolution agreed to by the committee of the whole, by striking out of the same the word "not."

The Speaker put the question whether the House would agree to the said motion of Mr. Edgerton, and it was determined in the negative.

Nays, 103. Ayes, 8.

Thereupon, the report of the committee of the whole being divided, Mr. Speaker put the question whether the House would agree to so much of the said report as is contained in the first of the said resolutions, and it was determined in the affirmative.

Ayes, 66. Nays, 42.

Thereupon, the House agreed to the second resolution.

Ayes, 101. Nays, 3.

Assembly Journal, 1829, pages 501 to 505. See also pages 485 and 499.

Case of Henry F. Jones and Thomas Tredwell.**QUEENS COUNTY — PETITION PRESENTED.**

STATE OF NEW YORK,
IN ASSEMBLY, *January 7, 1830.* }

The petition of Henry F. Jones, praying that he may be admitted to a seat in this House in the place of Thomas Tredwell, the sitting member, returned as duly elected in and for the county of Queens was read and referred to the committee on privileges and elections.

Assembly Journal, 1830, page 39.

**REPORT OF THE COMMITTEE ON PRIVILEGES AND ELECTIONS IN
THE CASE OF HENRY F. JONES AGAINST THOMAS TREDWELL.**

IN ASSEMBLY, *January 25, 1830.*

Report of the standing committee on privileges and election, on the petition of Henry F. Jones, praying that he may be admitted to a seat in the House, in place of Thomas Tredwell the sitting member.

Mr. Davis from the standing committee on privileges and elections, to whom was referred the petition of Henry F. Jones of the county of Queens, praying to be admitted to a seat in this House, in place of the Hon. Thomas Tredwell, with the accompanying documents, reports:

By the official statement of the board of canvassers for the county of Queens hereto annexed, marked A it appears that at the last annual election held on the 2d, 3d and 4th days of November last, one thousand seven hundred and eighty votes were given in the said county, for member of Assembly; that of these votes the Hon. Thomas Tredwell received eight hundred and ninety-one votes, and the petitioner, Henry F. Jones, received eight hundred and eighty-nine votes, giving to the sitting member a majority of two votes.

It further appears to your committee that the said Thomas Tred-

well and the petitioner were the only regularly nominated candidates at that election, for member of Assembly for that county, and that they are the only persons of that name in that county.

The petitioner claims five votes given in the town of Flushing, in said county, which were rejected by the inspectors of election in said town on the canvass of votes, and not returned to the board of county canvassers in the statement made by the town canvassers, nor allowed by the said board of county canvassers to the petitioner or any other person, but were duly presented and delivered to the town clerk of that town.

The five votes thus claimed were found in the proper box properly indorsed for H. F. Jones, without designating the Christian name further than by initials H. F.

These facts not only appear from the annexed affidavits B, C, L, G, H, of the supervisor, town clerk, one of the assessors, and others, but by the admission of the sitting member.

The petitioner further claims two votes given in the town of Hempstead, in said county, one for Henry Floyd and one for Floyd Jones, neither of which were allowed to the petitioner by the town or county canvassers. (*Vide* affidavits No. 3, 4, 5, 6, and B.)

The petitioner claims these votes upon the ground that he is generally known and called by the name of Henry Floyd, which fact is established by the affidavit, hereto annexed marked No. 1, of twenty persons, inhabitants of the county of Queens; and also, on the further ground that one William Wheeler, an elector of said town of Hempstead, testifies that on the 4th day of November last, he wrote a vote for Henry Floyd; that he saw it deposited in the proper box for member of Assembly, and that it was his intention when he deposited said ballot to vote for the petitioner. (*Vide* affidavit annexed marked No. 2.)

The sitting member claims two votes given in the town of Flushing, in the said county, which were rejected by the inspectors of election in the said town on the canvass of votes, and not returned to the board of county canvassers, nor allowed by them, but were

preserved and delivered to the town clerk of said town, and duly filed in said office.

The two votes thus claimed were found in the proper box properly endorsed for "T. Tredwell," without designating the Christian name further than by the initial T.

These facts appear from the annexed affidavits marked I, of the town clerk and assessor of said town of Flushing, and by the admission of the petitioner.

The sitting member further claims four votes given in the said town of Hempstead, at the said election found in the justice's box, headed Assembly, and properly indorsed and with the name of Thomas Tredwell written or printed thereon.

The sitting member rests his claim to these votes, upon the ground that the same were not allowed or counted to him, either by the town or county canvassers.

To support this fact, he produces to your committee several affidavits made by the supervisor, two of the assessors and the clerk of the board for the said town of Hempstead.

Upon this point, and as to the number of votes, there is much looseness and some contradictory evidence.

To enable the House the better to understand, the committee have deemed it their duty to present the said affidavits entire.

First, those of the sitting member, marked J, K, L, M, N, O.

Secondly, those of the petitioner in opposition, marked Y, V, X, W, U, T, S, Q, P, R.

DOCUMENTS:

J.

COUNTY OF QUEENS, }
Town of Hempstead, } ss.:

I, Joseph Smith, Jr., of the town of Hempstead, county of Queens, do solemnly swear, that I am one of the assessors of said town, and that I attended the general election of said town, on the second, third and fourth days of November, 1829, as one of the in-

spectors of election in and for said town; that I assisted in canvassing the votes taken during the said election; that of the votes given for members of Assembly, there were four separate ballots found in the justices' box, headed for Assembly, and indorsed in the manner prescribed by law, and that on each of the said ballots were written or printed the name of Thomas Tredwell, and that on the said canvass the said ballots were not allowed or counted for the said Thomas Tredwell.

JOSEPH SMITH, JR.

Sworn and subscribed before me }
the 14th day of January, 1830. }

JOSEPH PETTIT,

One of the judges of said county.

K.

COUNTY OF QUEENS, }
Town of Hempstead, } ss.:

John W. De Mott, of the town of Hempstead, in the county of Queens, being duly affirmed, saith he was one of the clerks of the last anniversary election held in the town of Hempstead and county aforesaid, and that he attended as clerk to the canvass of the votes; and the deponent further saith there was four separate ballots found in the justices' box headed for Assembly and indorsed in the manner prescribed by law, and that on each of the said ballots was written or printed the name of Thomas Tredwell, and that on the said canvass the said ballots were not allowed or counted for the said Thomas Tredwell, to his recollection.

JOHN W. DE MOTT.

Affirmed before me, }
14th January, 1830. }

OLIVER DENTON,

Justice of the Peace.

L.

STATE OF NEW YORK, } ss.:
Queens County,

I, William Everitt, of the town of Hempstead, county of Queens, do solemnly swear that I am one of the assessors of said town, and that I attended the general election of said town on the 2d, 3d and 4th days of November 1829, as one of the inspectors of election in and for said town; that I assisted in canvassing the votes taken during the said election; that of the votes given for member of Assembly there were three or four separate ballots found in the justices' box headed "for Assembly" and indorsed in the manner prescribed by law, and that on each of the said ballots were written or printed the name of Thomas Tredwell; and that on the said canvass, whether the said votes were or were not counted for the said Thomas Tredwell this deponent is not certain, but his impression is that they were not.

WILLIAM EVERITT.

Sworn before me this 14th
 day of January, 1830.

DAVID LAMBERSON,
*One of the Judges of the Court of Common Pleas
 for said County of Queens.*

M.

COUNTY OF QUEENS, } ss.:
Town of Hempstead,

Daniel K. Smith, upon the deposition of his affirmation, saith that he was one of the clerks at the last anniversary election held in the town and county aforesaid, and that he attended as clerk to the canvass of the votes; and this deponent further saith there was a number of separate ballots found in the justices' box, three or more, to the best of his recollection, headed "for Assembly" and indorsed in the manner prescribed by law, and on each of the said

ballots were written or printed the name of Thomas Tredwell, and that these ballots were not canvassed nor allowed to the said Thomas Tredwell, to his recollection.

DANIEL K. SMITH.

Affirmed and subscribed before me,
the 14th day of January, 1830.

JOSEPH PETTIT,
One of the Judges of the said County.

N.

COUNTY OF QUEENS, }
Town of Hempstead, } ss.:

I, Robert Davison, of the town of Hempstead, county of Queens, do solemnly swear, that I am supervisor of the town of Hempstead, and that I attended the general election of said town, held on the 2d, 3d and 4th days of November, 1829, as one of the inspectors of election for said town; that I assisted in canvassing the votes for the office of member of Assembly. There were three or four ballots found in the justices' box, with the name of Thomas Tredwell, they being indorsed for Assembly, and that those ballots were not canvassed or allowed, to the best of my knowledge, to the said Thomas Tredwell.

ROBERT DAVISON.

Sworn and subscribed before me,
December 18th, 1829.

WM. MCNEIL,
Justice of the Peace.

COUNTY OF QUEENS, }
Town of Hempstead, } ss.:

Robert Davison, of the town of Hempstead, in the county of Queens, being duly sworn, doth depose and say, that he is supervisor of the said town, and that he attended the general election held in the said town, on the 2d, 3d and 4th days of November last, as one of the inspectors appointed to attend said election, in and for said

town; and that he assisted, as such inspector, in canvassing the votes taken during the said three days of election; and that of the votes given for member of Assembly at said election, there were three or four separate ballots found in the justice's box headed for Assembly, and indorsed in the manner prescribed by law, and that on each of the said ballots was written or printed the name of Thomas Tredwell; and that on the said canvass, whether the said votes were or were not counted for the said Thomas Tredwell this deponent doth not know, but his impression is that they were not; and this deponent further saith, that he lately made an affidavit before James L. Cogswell, Esq., in relation to the said votes found in the justice's box, in which this deponent stated that whether the said votes were or were not allowed to Thomas Tredwell on the final canvass of votes for members of Assembly, this deponent did not know, and, therefore, could not say; that at the time of signing said affidavit, this deponent stated that it was his impression that the said votes were not allowed to the said Thomas Tredwell, and wished it to be stated in the said affidavit, which Mr. Henry F. Jones declined to have inserted, he being present at the time the said affidavit was made, at his request.

ROBERT DAVISON.

Subscribed and sworn, 14th January,
1830, before me,

OLIVER DENTON,
Justice of the Peace.

O.

QUEENS COUNTY, ss.:

Robert Davison, of the town of Hempstead, in said county, being duly sworn, deposeth and saith, that he is the supervisor of the town of Hempstead, and that he attended the general election of said town, held on the second, third and fourth days of November, 1829, as one of the inspectors of elections for said town; that he assisted in canvassing the votes taken during said election; that of the votes given for the office of member of Assembly there were three or four

ballots found in the justice's box with the name of Thomas Tredwell, they being indorsed for the Assembly, but whether those ballots were allowed or counted to the said Thomas Tredwell this deponent doth not know, but his impression is that they were not, and that lately he made affidavit before James L. Cogswell, Esq., in relation to those ballots found in the justice's box; that at the time of signing said affidavit this deponent stated that it was his impression that the said votes were not allowed to the said Thomas Tredwell, and wished it to be stated in the said affidavit, which Mr. Henry F. Jones has declined to have inserted, he being present at the time the said affidavit was made.

ROBERT DAVISON.

Subscribed and sworn, 4th
January, 1830, before me,

OLIVER DENTON,
Justice of the Peace.

Y.

We, the board of inspectors of elections for the town of Hempstead, in the county of Queens, do certify, that the following is a correct statement of the result of a general election held in said town, on the second, third and fourth days of November, 1829. Five hundred and seventy-three votes were given for the office of Senator; seven hundred and ninety-nine votes were given for the office of members of Assembly; seven hundred and seventy-one votes were given for the office of justice of the peace. Of the votes given for the office of Senator Silas Wood received four hundred and eighteen votes; Jeremiah Johnson received, for the same office, four hundred and sixteen votes; Alpheus Sherman received, for the same office, one hundred and fifty-one votes; Jonathan S. Conklin received, for the same office, one hundred and fifty-one votes; J. Johnson received, for the same office, one vote. Of the votes given for the office of member of Assembly Thomas Tredwell received six hundred and thirty-one votes; Henry F. Jones received one hundred and sixty-eight votes; Henry Floyd received, for the same

office, one vote; Floyd Jones received, for the same office, one vote. Of the votes given for the office of justice of the peace Wm. McNeil received four hundred and thirty-five votes; Joseph Dorlon received, for the same office, two hundred and fifty-four votes; James T. Gildersleeve received, for the same office, sixty-two votes; William Mott received, for the same office, twenty votes. In witness whereof, we have hereunto subscribed our names, this fifth day of November, in the year one thousand eight hundred and twenty-nine.

ROBERT DAVIDSON,
ALBERT HENTZ,
JOHN JACKSON,
DANIEL MOTT,
JOSEPH SMITH, JR.,
WILLIAM EVERITT,

Inspectors of Election.

I do hereby certify, that the foregoing is a true copy of the certificate or statement made by the board of inspectors of elections for the town of Hempstead, in the county of Queens, as the same remains on file in the clerk's office of the county of Queens. In testimony whereof, I have hereunto set my hand and seal of the office, the 29th day of December, 1829.

SAMUEL SHERMAN,
Clerk of Queens County.

V.

STATE OF NEW YORK, }
Queens County, } ss.:

John Jackson being duly sworn, doth depose that he is one of the inspectors of election for the town of Hempstead, and presided as such at the last general election held on the 2d, 3d and 4th days of November last past, and was present at the canvass of votes given at said election. That while canvassing the votes for justice of the

peace, one or two votes were found in the box provided for justices of the peace, for Thomas Tredwell as member of Assembly, which votes it was then agreed by the board of inspectors should be allowed to the said Thomas Tredwell, and this deponent believes that the said votes were so allowed in the final canvass for members of Assembly, to the said Thomas Tredwell.

JOHN JACKSON.

Sworn to and subscribed before me
this 29th day of December, 1829.

THOMAS B. JACKSON,
Commissioner, etc., for Queens County.

X.

STATE OF NEW YORK, }
Queens County, } ss.:

Platt Willets, of the town of Hempstead, being duly sworn, doth depose and say that he is a resident of the village of Hempstead, was occasionally at the board during the canvass of the votes of the town of Hempstead, on the 5th day of November last past, and that he never heard at that time, of any votes found in the justice's box for Thomas Tredwell that were not allowed to him by the inspectors of said canvass. And further, the election has frequently been the subject of conversation in the village of Hempstead; and that he has never heard in the course of that conversation, any votes having been found in the justice's or any other box, that were not allowed to Thomas Tredwell, and that at the first of his hearing of the above mentioned votes, was after the 20th of December inst., and further, the deponent says that he has had a conversation with two of the acting inspectors of the town of Hempstead since the 20th of December, in which they said that those votes which were found in the justice's box for Thomas Tredwell, were the subject of conversation at the board of canvassers at the time of the canvass, and agreed that they should be allowed and did not know but they were allowed

at the time of the canvass, as they presumed at the time that everything was done legally, inasmuch as they had the election law before them at the time.

PLATT WILLETS.

signed and sworn before me this

30th day of December, 1829.

JAS. L. COGSWELL, J. P.

W.

STATE OF NEW YORK, } ss.:
Queens County,

James L. Cogswell, being duly sworn, doth depose that he was at the house of Joseph Smith, Jr., on the 25th day of November last, in the town of Hempstead and county aforesaid, to take the affidavit of the said Joseph Smith, Jr., as one of the inspectors of the annual election held for the said town, on the second, third and fourth days of November, 1829, in relation to two votes given at said election, one for Henry Floyd and the other for Floyd Jones; and that he distinctly recollects to have heard Henry F. Jones ask the said inspector, Joseph Smith, Jr., if there were any votes or ballots found in any of the boxes other than the Assembly box (at the time the canvass of the town of Hempstead took place), for Thomas Tredwell, as member of the Assembly, that were not allowed by the board of town canvassers; to which the said Joseph Smith, Jr., replied that there were no votes found in any of the other boxes for Thomas Tredwell, as member of Assembly, that were not allowed and counted to him in the final canvass for member of Assembly.

JAS. L. COGSWELL,

Justice of the Peace for County of Queens.

I do hereby certify that James L. Cogswell, one of the justices of the peace for the county of Queens, appeared before me, this 29th

day of December, 1829, being duly sworn, says that the above certificate is the truth, the whole truth and nothing but the truth.

SILAS TITUS.

V. D. WATER,

Commissioner for the County of Queens.

SOUTH OYSTER BAY, December 29, 1829.

U.

STATE OF NEW YORK, { ss.:
Queens County, }

Albert Hentz, of the town of Hempstead in the county of Queens, being sworn, says that he resides in the said town of Hempstead, and has been town clerk of said town for several years past; that as such clerk he presided at the last general election, on the second, third and fourth days of November, 1829, and was present and assisted at the canvass of votes polled at the said election; that he recollects two or three votes for Thomas Tredwell, properly indorsed, were found in the box appropriated for the votes of justice of the peace; that a conversation about the legality of said votes was had at the time of such canvass, and the same were saved by the inspectors, for the purpose of being allowed to the said Thomas Tredwell; and if the said votes were not it is unknown to said deponent.

ALBERT HENTZ.

Sworn and subscribed, Dec.

30th, 1829, before me.

WM. McNEIL,

Justice of the Peace of Queens County.

T.

QUEENS COUNTY, ss.:

Daniel Mott, of the town of Hempstead, in the county of Queens, being duly sworn says that he was one of the acting inspectors of the annual election, held in said town on the second, third and fourth days of November, 1829; that he was at the canvass of the

votes for the town of Hempstead on the fifth, and at said canvass there was found in the justice's box one, two or three votes for Thomas Tredwell, and at the time of those being found in said box, there was a conversation at the board relative to them, and that the said board agreed to count them for the said Thomas Tredwell; that he, the deponent, was aware of the propriety of allowing them to the said Thomas Tredwell, and this deponent presumes that everything was done according to law, at the time of the said town canvass.

DANIEL MOTT.

Dec., 1829, before me, }
Subscribed and sworn the 28th }

ELIAS HICKS,
Commissioner, etc.

S.

QUEENS COUNTY, ss.:

Robert Davison, supervisor, of the town of Hempstead, in the said town of Queens, being duly sworn, says, that he was one of the acting inspectors of the poll of the last general election, and presided at the final canvass of the votes on the fifth of November last; that in canvassing the box designated to receive the votes for justice of the peace, there were three or four votes found containing the name of Thomas Tredwell, which he believes were properly indorsed for member of Assembly, but whether such votes, so found as aforesaid, were or were not allowed to the said Thomas Tredwell, on the final canvass, the said Robert Davison does not know, and, therefore, cannot say. Dated the 30th day of December, 1829.

ROBERT DAVISON.

Sworn and described the 30th of, }
December, 1829, before me, }

JAMES L. COGSWELL,
Justice of the Peace.

Q.

QUEENS COUNTY, ss.:

William Everett, of the town of Hempstead, being sworn, saith, that he is one of the assessors of the town of Hempstead, in the county of Queens, and presided at the last general election in the said town, on the second, third and fourth days of November last, and was present and assisting in the final canvass on the fifth; that in canvassing the box designated to receive the votes for justices of the peace, three or four votes, but thinks four, were found for Thomas Tredwell, and indorsed "Assembly;" that one of these votes so found was put in the said box by this deponent, by mistake, and immediately mentioned the circumstance to the other inspectors, and they replied that such vote would not be lost, but whether on the final canvass of votes for members of Assembly, the votes so found in the justice's box were allowed to the said Thomas Tredwell or not, he does not know, but is rather of impression that they were not allowed. Dated, Dec. 31st, 1869.

WM. EVERETT.

Subscribed and sworn before me, }
as above dated, }

GEORGE VAN NOSTRAND,
Justice of the Peace.

QUEENS COUNTY, ss.:

The said William Everett, being further sworn, says, that if any other affidavit in relation to the last election, or the canvass of votes thereat, this deponent has said anything more or further than what is contained in the above affidavit, it is what this deponent did not mean or intend. Dated, January 2d, 1829.

WILLIAM EVERETT.

Subscribed and sworn before me,

JOHN RHOADES, JR.,
Justice of the Peace.

January 2d, 1830.

P.

STATE OF NEW YORK, } ss.:
Queens County,

Daniel K. Smith, being affirmed, doth depose and say that he was one of the acting clerks of the election held on the 2d, 3d and 4th days of November last past, for the town of Hempstead, and was at the canvass of the votes for the said town on the 5th day of November, 1829, held at the house of Albert Hentz, in the village of Hempstead, and at said canvass they canvassed the box containing the ballots for justice of the peace, first, and that there were two votes and no more, that he recollects, found in said box for Thomas Tredwell; does not recollect if they were properly indorsed or not and that he presumed that the transactions of the board of town canvassers at the time, were correct and true to the extent of his knowledge and belief. And this deponent further says the election has frequently been the subject of conversation in the town of Hempstead, in which he resides, but that he has never heard of any votes found in the justices' box that were not allowed to Thomas Tredwell or any one else, until Saturday, the 26th day of December, instant. This deponent further states that he is not willing to affirm the above mentioned two votes were allowed to Thomas Tredwell or were not allowed to him.

DANIEL K. SMITH.

Signed and affirmed before me, this }
 29th day of December, 1829. }

JAS. L. COGSWELL,

Justice of the Peace.

R.

STATE OF NEW YORK, } ss.:
Queens County,

James L. Cogswell, of said county, being duly sworn, doth depose, that on the 29th day of December, 1829, that he heard Robert Davison, supervisor of the town of Hempstead, say that he attended,

on the 5th day of November last past, as one of the board of town canvassers, and at said canvass there were three or four ballots or votes, he does not recollect which, found in the justice's box with the name Thomas Tredwell on them; that he, the said Robert Davison, does not recollect whether they were properly indorsed or not, but presumes they were. And that he had, at the time of the above mentioned canvass, the election law before him, and that one other inspector had the election law also; that he, Davison, was well aware, at the time of the above mentioned town canvass, that the election law was explicit upon the subject of votes found in boxes other than the Assembly box (provided they were properly indorsed), that they should be allowed to the person whose names were designated within such ballots or votes so found. And further, the said Davison did not intend, in the affidavit given to Mr. Tredwell, to be understood as saying positively that the three or four votes therein mentioned and found in the justice's box were not allowed to him in the final canvass of the votes, nor could he swear that they were allowed to him at the final canvass of votes for he did not know; and further, that he, Davison, thought that they had proceeded legally at the time of the canvass, and so made out his return.

He further said that he would meet Henry F. Jones at the village of Hempstead on the 30th day of December, and testify that he did not intend to give any certificate which would go to say that he swore that the three or four votes in the justice's box, heretofore mentioned, were not allowed to Mr. Tredwell, nor that they were allowed to him by the said board of town canvassers for the town of Hempstead, repeating again for that he could not swear that they were not allowed nor that they were allowed; adding how could he swear at this time when he did not know the fact.

JAS. L. COGSWELL.

STATE OF NEW YORK, }
Queens County, } ss.:

James L. Cogswell appeared before me this 30th day of December, 1829, and was duly sworn, and says the facts set forth in the within affidavit are the truth, the whole truth, and nothing but the truth.

SILAS TITUS.

V. D. VATER,

Commissioner for Queens County.

SOUTH OYSTER BAY, *December 30, 1829.*

From the foregoing facts, four points are presented for the consideration of your committee.

1. Is the petitioner entitled to the five votes in the town of Flushing?

2. Is the petitioner entitled to the two votes in the town of Hempstead?

3. Is the sitting member entitled to the two votes in town of Flushing?

4. Is the sitting member entitled to the four votes found in the justice's box?

Upon the first and third points, your committee are unanimously of the opinion that the petitioner is entitled to the five votes in the town of Flushing, and the sitting member to the two votes in the same town.

Upon the second point, your committee forbear to express any opinion, as in any event those votes cannot vary the result.

Upon the fourth and last point, your committee have come also to the unanimous conclusion that the sitting member is not entitled to the allowance of the four votes found in the justice's box.

In coming to this conclusion, your committee are satisfied that votes were found in the justice's box to which the sitting member was entitled; but, after a careful and patient examination of all the facts, your committee are not satisfied either as to the number thus

found or that the number found were not allowed to the said sitting member.

Your committee proceeded in arriving to this conclusion, upon the ground, first, that the party claiming the allowance of votes, must show, beyond all reasonable doubt, his right to them by testimony positive and unequivocal; he has no right to call upon the committee or this House to weigh or balance probabilities or to pass upon the credit of conflicting testimony upon a question vitally affecting the elective franchise. Is the testimony in this case of that character? In the first place, no one has sworn positively that the votes were not allowed, except Joseph Smith, Jun., one of the assessors, and he stands contradicted by the affidavit of Mr. Cogswell, who testifies that on the 25th day of November last, this same Mr. Smith, when inquired of by the petitioner as to the fact whether any votes for Thomas Tredwell had been found in any of the boxes other than the Assembly box, at the time that the canvass took place, that were not allowed by the board of town canvassers, answered that there were no votes found in any of the other boxes for Thomas Tredwell as member of Assembly, that were not allowed and counted to him on the final canvass. All the other witnesses, although they testify as to the number found in the justice's box, varying that number from three to four votes, speak only as to their impression that they were not allowed, or that they were not to their recollection, giving no reason for those impressions, or any if they were not allowed why they were not, or what became of such ballots.

Your committee think this testimony of itself too uncertain and loose, with any safety to rely, standing opposed as it does to the legal presumption that the board did their duty, and if so, they must have allowed said votes. But, in aid of this presumption, the petitioner has furnished the official return of the inspectors of that town to the board of county canvassers, which gives the whole number of votes polled in that town for Assembly at that election at seven hundred and ninety-nine. Of these, the sitting member was al-

lowed six hundred and thirty-one, and the petitioner one hundred and sixty-eight, corresponding in the aggregate with the whole number given. Secondly,

1. The affidavit of John Jackson, one of the inspectors of said town, who testifies that one or two votes were found in the justice's box for Thomas Tredwell, which it was then agreed by the board should be allowed to the said Thomas Tredwell, and he believes they were so allowed.

2. The affidavit of Albert Hentz, the clerk of the said town, who testified that two or three votes were thus found for Thomas Tredwell; that a conversation about the legality of said votes was had at the time of the canvass, and that the same were saved by the inspectors for the purpose of being allowed to the said Thomas Tredwell, and if the said votes were not allowed, it was unknown to him.

3. The affidavit of Daniel Mott, another inspector, testified, that one, two or three votes were thus found; that a like conversation was had, and that the board agreed to count them to the said Thomas Tredwell; that he was aware of the propriety of allowance of them, and he presumed that everything was done according to law.

4. The affidavit of Robert Davison, the supervisor of said town, who testified that three or four votes were thus found, but whether allowed or not, cannot say.

5. The affidavit of William Everett, another inspector, who testifies that three or four votes were thus found; one put in by himself by mistake; that, at the time, it was remarked by the board that the vote would not be lost, but whether allowed on the final canvass, he cannot say, rather his impression they were not.

6. The affidavit of Daniel K. Smith, acting clerk of the said board, who testifies that he was present at the canvass; that they canvassed the justice's box first; that two votes, and no more, as he recollects, were found in the box, and he presumes that the transaction was correct, but cannot say whether the two votes were allowed or not.

7. The affidavit of Mr. Cogswell, as to a conversation with the

supervisor, Mr. Davison, not materially varying the facts sworn to by Mr. Davison, in the several affidavits made by him, but showing the additional fact, the knowledge of Mr. Davison, at the time, of the law, and the right of Mr. Tredwell to the votes thus found.

Your committee have thus presented all the facts submitted to them, with the conclusions of their minds on these facts, and if those conclusions be correct, then the result will be as follows:

Allowing the petitioner the five votes of the town of Flushing, will give him nine hundred and ninety-four votes, and to the sitting member the two votes of the same town, will give him nine hundred and ninety-three votes, and to the petitioner one majority.

Your committee, therefore, beg leave to submit the following resolutions:

Resolved, That the seat of the Hon. Thomas Tredwell, the sitting member of this House, be vacated.

Resolved, That the petitioner, Henry F. Jones, be admitted as a member of this House, duly elected from the county of Queens, in the place of the Hon. Thomas Tredwell, the sitting member.

Assembly Journal, 1830, page 119.

Assembly Document, 1830; vol. 1, Doc. No. 51.

IN ASSEMBLY, *January 27, 1830.*

The House resolved itself into a committee of the whole on the resolutions reported by the committee on privileges and elections, on the petition of Henry F. Jones praying for admission to a seat in this House, as the member duly elected in and for the county of Queens in place of Thomas Tredwell, the member returned, and after some time spent thereon Mr. Speaker resumed the chair, and Mr. Bradish, from the said committee, reported that the committee had agreed to the following resolutions:

Resolved, That the seat of the Hon. Thomas Tredwell, the sitting member of this House, be vacated.

Resolved, That the petitioner, Henry F. Jones, be admitted as a member of this House, duly elected from the county of Queens, in the place of the Hon. Thomas Tredwell, the sitting member.

Which he was directed to report to the House, and he read the report in his place, and delivered the same in at the table, where it was again read.

Thereupon, Mr. Granger made a motion that the House should agree to lay the said report upon the table.

Mr. Speaker put the question whether the House would agree to said motion and it was determined in the negative.

Nays, 61. Ayes, 45.

Thereupon, Mr. Speaker put the question whether the House would agree with the committee of the whole in their said report, and it was determined in the affirmative.

Ayes, 90. Nays, 9.

Thereupon, Mr. Henry F. Jones, declared to have been duly elected a member of the Assembly, in and for the county of Queens, appeared in the Assembly Chamber.

Ordered, That Mr. Savage and Mr. Livingston attend with him before some proper officer and see him duly qualify.

Assembly Journal, 1830, pages 133, 134, 135.

IN ASSEMBLY, *January 28, 1830.*

Mr. Savage, from the committee appointed to attend with Mr. Jones before some proper officer and see him duly qualify, reported that they had attended with him before Mr. Justice Marcy and seen him duly qualify.

Ordered, That Mr. Jones do take his seat.

Assembly Journal, 1830, page 136.

Case of David G. Seger and Henry G. Wheaton.

ALBANY COUNTY — PETITION OF DAVID G. SEGER.

IN ASSEMBLY, *January 7, 1835.*

The Petition of David G. Seger, of the county of Albany, praying to be admitted to his seat in this House, in the place of Henry G.

Wheaton, was read, and referred to the committee on privileges and elections.

Assembly Journal, 1835, page 29.

IN ASSEMBLY, *January 9, 1835.*

Mr. Wilcoxson, from the committee on privileges and elections, to which was referred the petition of David G. Seger, praying to be admitted to a seat as a member of this House, reported as follows: Assembly Journal, 1835, page 42.

REPORT OF COMMITTEE ON PRIVILEGES AND ELECTIONS IN THE
CASE OF DAVID G. SEGER AGAINST HENRY G. WHEATON.

IN ASSEMBLY, *January 9, 1835.*

Report of the committee on privileges and elections, on the petition of David G. Seger.

Mr. Wilcoxson, from the committee on privileges and elections, to whom was referred the petition of David G. Seger, praying that he may be permitted to take his seat as a member in this House, reported:

That your committee, before proceeding to the investigation of the claims of Mr. Seger to a seat as a member in this House, caused a written notice to be served on Henry G. Wheaton, whose seat is sought to be vacated, apprising him of the time and place the committee would meet to determine the claim of Mr. Seger to a seat, to which Mr. Wheaton replied, in writing, in substance as follows:

That he, Mr. Wheaton, was satisfied that Mr. Seger is entitled to a seat in preference to himself, as having received the greatest number of votes; that he would be the last person to seek to hold that or any other office without being called to it by the free suffrage of his fellow-citizens, and had nothing to say against Mr. Seger taking his seat.

That the testimony of James Gourlay, one of the inspectors of election in the second ward of the city of Albany, at the last general election held in said ward, on the third, fourth and fifth days of November last past, and the testimony of Josiah W. Cary, clerk of said board, both of whom were sworn before your committee, established the following facts:

That David Seger was a candidate for the office of member of Assembly, at the election aforesaid, and that he received for that office during that election in the second ward of the city of Albany four hundred and thirty-six votes. That the inspectors in said ward, in making out their certificates of the candidates voted for and the number of votes given to each, inserted therein, by mistake, the name of Daniel G. Seger for David G. Seger, and forwarded their certificate (thus erroneous) to the county canvassers, and also filed a duplicate thereof in the proper office, and that there was no such person as Daniel G. Seger voted for in said ward during said election.

That upon examining the certificate of the inspectors aforesaid, exhibited to your committee by the clerk of the county of Albany, and proven by the oath of James Gourlay to be the certificate of said inspectors, it appears that Daniel G. Seger received, in said second ward, four hundred and thirty-six votes for the office of member of Assembly and David G. Seger none.

That upon examining the official canvass of the county canvassers, of the votes taken at the election aforesaid, in the several towns and wards in the city and county of Albany, produced and proven to your committee by the oath of Conrad A. Ten Eyck, clerk of the county of Albany aforesaid, it appears that the whole number of votes given for Henry G. Wheaton, in the several wards and towns aforesaid, for the office of member of Assembly, is four thousand eight hundred and eighty-two; for David G. Seger, for the same office, four thousand four hundred and eighty-five; and for Daniel G. Seger, for the same office, in the second ward of the city of Albany, four hundred and thirty-six; and in the same ward for David G. Seger, none.

Your committee are satisfied that the votes returned by the inspectors of the second ward as being given for Daniel G. Seger, were so returned by mistake; that no such votes were given in said ward, but that they were given for the petitioner, David G. Seger, and that the same ought to have been canvassed by the inspectors aforesaid, and by the county canvassers aforesaid, as so many votes

given to David G. Seger; and that, if so canvassed, he would have had a majority over Mr. Wheaton of thirty-nine.

Your committee, therefore, offer the following resolution:

Resolved, That David G. Seger be permitted to take his seat as a member of the House of Assembly, duly elected for the county of Albany, in the room of Henry G. Wheaton, the member returned; and that the seat of the said Henry G. Wheaton be vacated.

Assembly Document, 1835, vol. 1, No. 11.

Mr. Speaker put the question whether the House would agree to the said resolution, and it was determined in the affirmative.

Thereupon, Mr. Seger appeared in the Assembly Chamber, and the Speaker duly administered to him the oath of office prescribed by the Constitution.

Ordered, That Mr. Seger do take his seat.

Assembly Journal, 1835, page 42.

Case of Chauncey Keep and Lewis Riggs.

COUNTY OF CORTLAND — PETITION OF LEWIS RIGGS.

IN ASSEMBLY, *January 6, 1836.*

The petition of Lewis Riggs, of the county of Cortland, praying for a seat as a member of Assembly from said county, was read and referred to the committee on privileges and elections.

Assembly Journal, 1836, page 61.

REPORT OF COMMITTEE ON PRIVILEGES AND ELECTIONS.

IN ASSEMBLY, *January 9, 1836,*

Mr. O. Robinson, from the committee on privileges and elections, to which was referred the petition of Lewis Riggs, praying to be admitted to a seat as a member of Assembly from the county of Cortland, in place of Chauncey Keep, reported as follows:

Assembly Journal, 1836, page 97.

REPORT.

IN ASSEMBLY, *January 9, 1836.*

Report of the committee on privileges and elections on the petition of Lewis Riggs, etc.

Mr. O. Robinson, from the committee on privileges and elections, to whom was referred the petition of Lewis Riggs, of the county of Cortland, praying to be admitted to a seat in this House in the place of Hon. Chauncey Keep, the sitting member, reported:

That, by the official returns of the several boards of town canvassers of the several towns in the county of Cortland, duly made and filed in the clerk's office of said county, it appears that at the last annual election held on the second, third and fourth days of November last past, six thousand three hundred and thirty-nine votes were given in the said county for the office of member of Assembly; that of these votes, the petitioner, Lewis Riggs, received one thousand five hundred and ninety-one; James B. Church, one thousand five hundred and eighty; Chauncey Keep, the sitting member, one thousand five hundred and eighty-three; and Cephas Comstock, one thousand five hundred and eighty-five; giving Mr. Riggs a majority of eight votes over Mr. Keep. It further appears, that at said election held in the town of Virgil in said county, there were eight hundred and sixty-four votes given for the office of member of the Assembly; that of these votes Lewis Riggs received two hundred and eighty-six votes, James B. Church received two hundred and eighty-six votes, Chauncey Keep received one hundred and sixteen votes, and Cephas Comstock one hundred and sixteen votes, making eight hundred and four votes; and that the remaining sixty votes were rejected by the board of canvassers of said town of Virgil, "for the want of a proper designation."

It also further appears, that the board of county canvassers of said county rejected the whole votes so given in said town of Virgil; the result of which was Lewis Riggs received in the remaining towns one thousand three hundred and five votes; James

B. Church, one thousand two hundred and ninety-four; Chauncey Keep, one thousand four hundred and sixty-seven; and Cephas Comstock, one thousand four hundred and sixty-nine; giving Mr. Keep a majority of one hundred and sixty-two votes over Mr. Riggs; and that the said board of county canvassers certified such to be the result of said election, and in pursuance thereof gave to Mr. Keep a certificate of his election as a member of the Assembly from said county.

Your committee are unanimously of the opinion that the board of county canvassers erred in rejecting the votes of the town of Virgil; that they assumed powers not given them by any law of this State; that, in this case, as such board of canvassers, they possessed no discretionary or judicial powers, but their duties were merely ministerial; the statute requires them to attend at the clerk's office at a particular time, and from amongst their number choose a chairman, and calculate and ascertain the whole number of votes given at any election and certify the same to be a true canvass; in the performance of these duties the board of county canvassers do not act judicially but ministerially.

If the board of county canvassers had estimated and calculated, as was their duty to do, the votes given in the town of Virgil, the result would have been a majority of eight votes in favor of Mr. Riggs over Mr. Keep, the sitting member, and would have entitled him to a certificate of his election and to a seat in this House.

It further appears to your committee, that the sixty votes rejected by the board of town canvassers in said town of Virgil, were written upon thirty ballots, and that upon each of said ballots were the names of Chauncey Keep and Cephas Comstock; that these ballots were found in the proper box, and that no county officers were to be elected in said county at said last annual election except members of Assembly; that said county is entitled to elect two members of Assembly; and that said Lewis Riggs and James B. Church were two of the candidates voted for by a portion of the electors of said town for said office, and said Chauncey Keep and Cephas Comstock were also candidates voted for by another portion

of said electors for the same office, and that there were no other candidates voted for at said election in said town for said office; that said ballots were attached to a piece of paper by the inspectors of the election of said town, and filed in the office of the clerk of said town, which said ballots have been exhibited to your committee that it appears from said paper, so filed, that said inspectors rejected said ballots or votes "for the want of a proper designation."

It further appears to your committee, upon a careful inspection of said ballots, that upon two of said ballots there was no designation of the office to which said Keep and Comstock were intended by the elector to be chosen; that at the right of the names of said Keep and Comstock, on five of the remaining ballots, were the letters Ass, upon six others the letters Assemb, upon five others the letters Assembly, upon one other the letters Membs, upon one other the letters Mems, upon four others the letters Assn, upon two others the letters As, and upon the remaining four ballots was A, or something intended probably for a designation, but which was out of the power of your committee to decipher.

The sitting member, Mr. Keep, claims that these votes were given by the electors of said town for him for the office of member of the Assembly, and that they should now be allowed and counted or estimated as votes given for him for said office. If these votes are allowed, the result will be that Mr. Keep will be entitled to retain his seat, having a majority of twenty-two votes over Mr. Riggs, the petitioner. That this House possess the power of correcting this error (if error it be), your committee do not doubt.

Your committee have looked in vain for a case giving a construction to the statute requiring the elector to designate upon the ballot the office to which the person named is intended by him to be chosen. No question of this kind has heretofore arisen either in our Legislature or in our courts of law, and we are now called upon for the first time to give a construction to the claim in question, and decide whether the designation upon the ballots in question, under the particular circumstances of the case, is substantially a compliance with the requirements of the statute.

The object of an election is defined by our Supreme Court to be: "That the person receiving the greatest number of votes in his favor shall have the office designated by the electors." If this be the correct definition of the object of an election, is the clause in the statute in question to be construed strictly and literally requiring the elector to write in words at length a description of the office of the person for whom he votes, or shall the statute be construed literally giving force and effect to the votes wherever and whenever the intent of the voter can be ascertained either from the ballots themselves or from the ballots and the attending circumstances.

Your committee have adopted the latter construction, because it is in accordance with the spirit of analogous cases decided by the Supreme Court, and of the rules adopted by the board of canvassers. Can there be, then, any doubt but that the electors who deposited the ballots in question in the proper box intended to vote for Mr. Keep for the office of member of the Assembly? No county officers except members of Assembly were to be voted for at that election, a matter which was, doubtless, well understood by all, as appears from the fact that there were no scattering votes, and that each of the two sets of candidates received the same number of votes in said town. The letters at the right of the names upon the ballots in question were, beyond doubt, intended by the voters as an abbreviation of the word Assembly; and this fact, in connection with the other circumstances of the case, have led your committee to the irresistible conclusion that the voters of these ballots intended to vote for Mr. Keep for the office of member of the Assembly, and that, therefore, he is entitled to retain his seat in this House. .

Your committee, therefore, ask leave to introduce the following resolution:

Resolved, That the prayer of the petitioner, Lewis Riggs, be denied, and that he have leave to withdraw his petition.

Assembly Document, 1836, vol. 1, No. 15.

Mr. Speaker then put the question whether the House would agree to said resolution, and it was determined in the affirmative. *Assembly Journal*, 1836, page 97.

Case of John Garretson, Jr., and Lawrence Hillyer.

COUNTY OF RICHMOND — PETITION PRESENTED.

IN ASSEMBLY, *January 16, 1837.*

The petition of John Garretson, Jr., of the county of Richmond, praying for a seat in this House, in the place of Lawrence Hillyer, and sundry affidavits in relation thereto, were read and referred to the committee on privileges and elections. *Assembly Journal*, 1837, page 17.

REPORT OF COMMITTEE ON PRIVILEGES AND ELECTIONS.

Mr. Poppino, from the committee on privileges and elections, to which was referred the petition of John Garretson, Jr., of the county of Richmond, praying to be admitted to a seat in this House, in the place of Lawrence Hillyer, the present sitting member from said county, reported that they have had the same under consideration, examined the affidavits taken in the examination before Jacob Tyson, first judge of the court of common pleas of the said county of Richmond, and ask leave to introduce the following resolution:

Resolved, That the prayer of the petitioner, John Garretson, Jr., be denied, and that he have leave to withdraw his petition.

Mr. Speaker put the question whether the House would agree to said resolution, and it was determined in the affirmative. *Assembly Journal*, 1837, page 101.

Case of Davis Hurd and Reuben H. Boughton.

COUNTY OF NIAGARA — PETITION PRESENTED.

IN ASSEMBLY, *January 17, 1837.*

The petition of Davis Hurd, of the county of Niagara, praying for a seat in this House, in the place of Reuben H. Boughton, the sitting member, was read and referred to the committee on privileges and elections.

Assembly Journal, 1837, page 84.

REPORT OF COMMITTEE ON PRIVILEGES AND ELECTIONS.

Mr. Cash, from the committee on privileges and elections, to which was referred the petition of Davis Hurd, of the county of Niagara, claiming to be admitted to a seat as a member of this House from the said county, in place of Reuben H. Boughton, the sitting member, reported as follows:

Assembly Document, 1837, vol. 2; No. 61.

IN ASSEMBLY, *January 24, 1837.*

Report of the committee on privileges and elections on the petition of Davis Hurd.

Mr. Cash, from the committee on privileges and elections, to whom was referred the petition of Davis Hurd, of the county of Niagara, praying to be admitted to a seat as member of Assembly, in the place of Reuben H. Boughton, reports:

That the committee have had the petition, together with the affidavits and certificates accompanying the same, under consideration. The petition sets forth, that in consequence of a clerical error committed by mistake and inadvertence, by the inspectors of the town of Somerset, in the said county of Niagara, one hundred and sixty-eight votes were returned to the board of county canvassers for "David" Hurd, instead of Davis Hurd, the memorialist, by which clerical error and mistake Reuben H. Boughton, one of the sitting members in this House, from the said county of

Niagara, received the certificate of election from the board of county canvassers of the said county of Niagara. These facts are verified and confirmed by the affidavits of the inspectors of election of the said town of Somerset, and the certificate of the board of county canvassers.

The said Reuben H. Boughton has also been before your committee, and cordially concurred in the facts and statements set forth in said petition, and expresses his entire willingness that the said Davis Hurd shall take the seat now occupied by him as member of Assembly.

The committee, therefore, ask leave to offer the following resolution:

Resolved, That Davis Hurd be permitted to take his seat as member of the House of Assembly, duly elected from the county of Niagara, in the place of Reuben H. Boughton, the sitting member, and that the seat of the said Reuben H. Boughton be vacated.

Assembly Document, Vol. 2, No. 61.

Mr. Speaker put the question, whether the House would agree to the said resolution, and it was determined in the affirmative.

Thereupon Mr. Hurd appeared in the Assembly Chamber, and the Speaker administered to him the oath prescribed by the Constitution.

Ordered, That Mr. Hurd do take his seat.

Assembly Journal, 1837, page 138.

Case of Theodore W. Sanders and John I. De Graff.

SCHENECTADY COUNTY — PETITION OF INHABITANTS OF
SCHENECTADY COUNTY.

IN ASSEMBLY, *January* 10, 1840.

Mr. L. S. Chatfield presented the petition of sundry inhabitants and electors of the county of Schenectady, alleging certain frauds to have been committed in the second ward of the city of Schenec-

tady at the recent general election, and praying that John I. De Graff be admitted to a seat as a member of Assembly, in the room of Theodore W. Sanders, the sitting member, who was alleged by the said petition to have been fraudulently returned to this House.

Mr. L. S. Chatfield moved, that the said petition, with the documents accepting the same, be referred to a select committee, to consider and report thereon.

Mr. Sanders moved to refer the said petition and documents to the standing committee on privileges and elections.

The latter motion having precedence, Mr. Speaker put the question, whether the House would agree to the said motion of Mr. Sanders, and it was determined in the affirmative.

Ayes, 68. Nays, 56.

Assembly Journal, 1840, page 108.

PETITION PRESENTED.

IN ASSEMBLY, *January 13, 1840.*

The petition of eighty-two inhabitants of the county of Schenectady, relative to frauds committed in the second ward of the city of Schenectady and that John I. De Graff be admitted to a seat as a member of the House, was read, and referred to the standing committee on privileges and elections.

Assembly Journal, 1840, page 108.

COMMITTEE REQUEST AUTHORITY TO SEND FOR PERSONS AND PAPERS.

IN ASSEMBLY, *January 10, 1840.*

Mr. T. H. Porter, from the standing committee on privileges and elections, to which was referred the petition of sundry inhabitants of the county of Schenectady, praying that John I. De Graff be admitted to a seat in this House, in the place of Theodore W. Sanders, reported, and offered for the consideration of the House, a resolution, requesting authority to send for persons and papers, in the words following, to wit:

Resolved, That the standing committee on privileges and elections, to which was referred the petition of sundry inhabitants of

the county of Schenectady, asking that John I. De Graff be admitted to a seat in this House in the place of Theodore W. Sanders, be authorized to send for persons and papers.

Mr. Speaker put the question whether the House would agree to said resolution, and it was decided in the affirmative.

Assembly Journal, 1840, pages 147 and 148.

MAJORITY REPORT OF COMMITTEE ON PRIVILEGES AND ELECTIONS.

IN ASSEMBLY, *April 4, 1840.*

Mr. T. H. Porter, from the majority of the standing committee on privileges and elections, to which was referred the several petitions of sundry citizens of the city of Schenectady alleging certain frauds in the second ward of said city at the general election in 1839, upon the ballot-boxes; and praying that John I. De Graff be allowed to take his seat as a member of the Assembly in the place of Theodore W. Sanders, who is alleged to be wrongfully returned by means of said frauds, reported as follows:

REPORT OF THE MAJORITY OF THE COMMITTEE ON PRIVILEGES AND ELECTIONS ON THE PETITIONS OF ELECTORS OF SCHENECTADY COUNTY.

Mr. T. H. Porter, from the majority of the committee on privileges and elections, to which was referred several petitions of sundry electors and inhabitants of the county of Schenectady, together with various documents, reports:

That soon after such reference, your committee met to examine the subject committed to them and deliberate upon the most correct mode of investigation, adapted to arrive at a just result between the conflicting interests involved. In determining upon some plan of action suited to guide them in their subsequent duties, your committee was well aware that it would be almost, or quite, impossible to satisfy the wishes or expectations of the respective parties concerned, by adopting any course short of free and full examination; and they, therefore, entered upon their course of inquiry with a single eye to full investigation. Your committee beg leave to ob-

serve they have met with peculiar difficulties in the novelty of this case; for so far as the knowledge of your committee extends none has heretofore been presented to your honorable body under similar circumstances; after an attentive perusal of the petitions and documents, the fact that John I. De Graff, for whose benefit the proceeding purported to have been brought before your honorable body, and who had been the rival candidate against Theodore W. Sanders, the sitting member, did not appear as a petitioner, or as claimant before this House, impressed itself upon the mind of your committee, as a truly remarkable feature, and seemed to them, at least, informal and without parallel. For in all cases of contested elections adjudicated upon in this House, or acted upon in our national legislative halls, so far as your committee have been enabled to discover, the person desiring possession of a disputed seat has always been the claimant in proper person against the right of the sitting member. Your committee suggested this to the counsel of the petitioners and the counsel of the sitting member, and proposed to them that the investigation should be had in the way and manner directed by the law of this State, title 5, chapter 7, part 1 of the Revised Statutes; to this, however, neither of the counsel were willing to accede. For the purpose of justice, your committee were obliged to reject, as proof, the affidavits attached to the petitions referred, because wholly ex-parte, and not within the scope of any of the provisions of the revised laws which particularly apply to contested elections, and without an adherence to which regulations there seems no mode of evidence.

The petitioners set forth and allege, as a cause why their prayer should be granted, that they believe a daring fraud has been committed by some person or persons, in abstracting ballots from the ballot-box kept during the late general election in the second ward of the city of Schenectady. They also state, that one hundred and seven persons had made affidavit that they had voted at the last election held in the second ward of the city of Schenectady, for John I. De Graff, and that they were all assured that at least ten

more would make a like affidavit. They also attached to their petition a transcript of the official canvass of the second ward of the city, and likewise of the statement of the board of county canvassers, which your committee include in this report.

“SECOND WARD CANVASS.

“We, the board of inspectors of election for the second ward of the city of Schenectady, in the county of Schenectady, do certify, that the following is a correct statement of the result of a general election held in said ward, on the fourth, fifth and sixth days of November, in the year one thousand eight hundred thirty-nine, for the election of three Senators for the third Senate district, one member of Assembly, for the county of Schenectady, and one coroner for the same county, viz.:

“That the whole number of votes given for the office of Senator was eight hundred and forty-nine, of which Friend Humphrey received one hundred and eighty-two; Mitchell Sanford received one hundred and eighty; Erastus Root received one hundred and seventy-seven; William H. Wilson received one hundred and three; Amasa J. Parker received one hundred and three; Henry W. Strong received one hundred and one; Israel Smith received two and William McCamus received one.

“That the whole number of votes given for the office of member of Assembly for the said county was two hundred and eighty-four, of which Theodore W. Sanders received one hundred and ninety-seven and John I. De Graff received eighty-seven.

“That the whole number of votes given for the office of coroner of the said county was two hundred and eighty, of which Edwin Frisbee received one hundred and seventy-five, George Conklin received one hundred and four, and Conklin received one.

“In witness whereof, we have hereto subscribed our names, this seventh day of November, 1839.

“DAVID M. MOORE,

“JOHN A. MERSELIS,

“JOHN LASSELS,

“*Inspectors of the said Election.*”

"The county board of canvassers of the county of Schenectady having met at the office of the clerk of the said county, in the city of Schenectady, on Tuesday, the twelfth day of November, in the year one thousand eight hundred and thirty-nine, a majority of said board being present, and having received the statements of the votes taken in each ward and town in the said county, at a general election held on the fourth, fifth and sixth days of November, in the year aforesaid, proceeded to estimate and canvass the votes of the said county so given; and it is certified that on such estimate and canvass, it appeared that the whole number of votes given at the said election, in said county, for member of Assembly, was three thousand and twenty-three, of which Theodore W. Sanders received fifteen hundred and thirty-nine and John I. De Graff received fourteen hundred and eighty-four. That the whole number of votes given in the said county at the said election for coroner was three thousand and nineteen of which Edwin Frisbee received fourteen hundred and eighty-seven and George Conklin received fifteen hundred and thirty. Conklin received one; Archibald L. Linn received one.

"In witness whereof, this statement is certified to be correct, and is attested by the signatures of the chairman and the secretary of the said board, this twelfth day of November, 1839.

"N. VAN VRANKIN,

"Chairman.

"ARCHIBALD CAMPBELL,

"County Clerk and Secretary."

"STATE OF NEW YORK, }
Schenectady County Clerk's Office. }

"I, Theodore R. Van Ingen, deputy clerk of the county of Schenectady, do hereby certify that I have compared the foregoing with the original return of the inspectors of elections of the second ward of the city of Schenectady and the original statement of the board of county canvassers, of the votes given for member of As-

sembly and county officers for the county of Schenectady, now remaining on file in this office, and that the same are correct transcripts therefrom, and of the whole of such originals.

"In witness whereof, I have hereunto subscribed my name, and affixed the seal of said county this 25th day of December, 1839.

"T. R. VAN INGEN,

"Deputy Clerk."

The committee having determined, in accordance to what they deemed due to the importance of the matters submitted to their consideration, to reject all ex-parte evidence, considered themselves required to apply to the House for power to send for persons and papers; which power being granted by the House, the chairman, in pursuance of the order of the committee, issued summonses for such persons as were required by the respective counsel; and in compliance with the summonses so issued, the following named persons appeared before the committee, and each of whom for himself testified that he voted for John I. De Graff, to which testimony the committee take leave to refer the House, viz.: Nathaniel Pratt, marked No. 36; Jacob Van Vranken, Jr., marked No. 37; John Farnsworth, marked No. 38; Abram Lewis, marked No. 39; Peter V. Peck, marked No. 40; Solomon Drullard, marked No. 41; Joseb Shurtliff, marked No. 35; Jacob Christianse, marked No. 42; Isaac C. Christianse, marked number 43; Alonzo B. Cerey, marked No. 34; Henry Teller, marked No. 44; John B. Bonney, marked No. 45; Jacob V. Steers marked No. 46; Robert C. Dorn, marked No. 47; Lewis Ford, marked No. 48; Isaac Van Wormer, marked No. 49; Lawrence Slover, marked No. 50; Patrick Keyes, marked No. 51; Freeman Thomas, marked No. 52; William H. Clute, marked No. 53; Edward H. Walton, marked No. 54; George Brown, marked No. 55; Horace B. Bills, marked No. 56; John Corl, marked No. 57; Myndert V. G. Bonney, marked No. 58; Patrick McCart, marked No. 59; Lewis Raymond, marked No. 60; Isaac W. Crane, marked No. 61; William Fuller, marked No. 62;

Allen Miner, marked No. 63; John W. Cory, marked No. 64; Stephen Clark, marked No. 65; Charles Ball, marked No. 66; Andrew C. Van Eps, marked No. 67; Benjamin P. Shelden, marked No. 68; George F. Vedder, marked No. 69; Andrew Truax, marked No. 70; Charles Dubois, marked No. 71; Cornelius Thompson, marked No. 72; Eleazar Clute, marked No. 73; John Babcock, marked No. 74; Jacob Beakley, marked No. 75; David Frank, marked No. 76; Vincent Blackburn, marked No. 77; Robert M. Fuller, marked No. 78; Nelson Hall, marked No. 79. And that Thomas Harmon, Joshua D. Harmon, Henry Smith, William Schermerhorn, Stephen Cooper, Herman Van Schaick, Ryer J. Schermerhorn, Peter Ouderkirk, John R. Schermerhorn, Ichabod W. Briggs, and Adrian V. S. Barhydt, were severally sworn and testified; to whose testimony, numbered 1, 2, 3, 4, 5, 6, 7, the committee beg leave to refer the House; and the committee also refer the House to the testimony of Abraham Doty, marked No. 80; David Lyon, marked No. 81; John Davis, marked No. 82; John McKim, marked No. 83; H. V. Schaick, marked No. 84; Elias Alsdorf, marked No. 85; Wm. B. Conant, marked No. 86; persons called by the petitioners.

The committee further report, that during the course of the investigation, the counsel for the sitting member, with a view to expedition as suggested by him, and at the solicitation of the counsel for the petitioners, admitted that the following named persons voted at the last general election, held in the second ward in the city of Schenectady, for John I. De Graff, namely: M. R. Case, Abraham A. Van Voost, George Anderson, John A. Barhydt, David Kittle, James M. Bouck, Roswell Perry, Cornelius J. Barhydt, James M. Albright, William Ouderkirk, D. H. Baker, James H. Ward, Andrew Fame, Volney Freeman, Christopher Devoe, William Tole, James V. S. Riley, John Vrooman, Peter H. Clute, Giles Yates, Elias Ayres, David P. Lancaster, Isaac Ledyard, John C. Barhydt, John Titus, David M. Moore, William H. Grout, Daniel T. Hoag, George Topping, William Sprague, Samuel Har-

man, Isaac G. Eldred, Matthew Putnam, L. W. Teller, John Consaul, G. J. Swartfager, Alanson Sherman, I. D. Harman, John saul, David Oxby, Jasper Nichols, L. J. Barhydt, Nicholas Rosa, D. W. Reed, James Courter, N. Barhydt, Cornelius Duane, William Cunningham, Solomon B. King, John S. Bonney, Peter Dorsh, James E. Kittle, Tunis Vrooman, Peter Van O. Linder, Stephen Waldron and John J. Fuller.

The committee also refer the House to the testimony of John A. Barhydt, marked No. 8; Nelson Van Valkenburgh, marked No. 9; John R. Edick, marked No. 10; Isaac C. Christianse, marked No. 11; Henry R. Wendall, marked No. 12; Peter Ouderkirk, marked No. 13; and James M. Albright, marked No. 14; which was taken at the request of the counsel for the petitioners.

At the request of the counsel for Theodore W. Sanders, summonses were issued for the persons hereafter named, and who in compliance therewith appeared before the committee, viz.: David M. Moore, John A. Merseles, and John Lassels, inspectors of the second ward election in the city of Schenectady, at the last general election and to whose testimony, marked No. 15, No. 16, No. 17, the committee refer the House. Also to the testimony of John Van Santvoord, marked No. 18; John Hull, Jr., marked No. 19; clerks of said election; likewise to the testimony of John Matthews, marked No. 20; William McCamus, marked No. 21; John Ohlen, marked No. 22; and John Constable, marked No. 23, in relation to the character and standing of the inspectors and clerks. Also to the testimony of Henry Mercelis, marked No. 24; William E. Russell, marked No. 25; and David Leavitt, marked No. 26, relative to the ballot-box. And the committee also refer the house to the testimony of Samuel Irish, marked No. 27; John Hull, Jr., marked No. 28; Simon Glen, Jr., marked No. 29; John Lassells, marked No. 30; Jared Anthony, marked No. 31; Michael Gerben, marked No. 32; and John G. Joyce, marked No. 33.

The county ballot-box used in the second ward, at the last November election, in relation to which, and the custody thereof, the charge of fraud and abstraction, is specially directed, was produced,

and the identity thereof satisfactorily proved to the committee, and they avail themselves of this stage of their report to remark, that in the security of its construction, they have never seen a ballot-box better adapted to prevent fraud than the one in question. It is so grooved and nailed that to take its body apart without detection, is almost or quite impossible. There are two covers to it; the inner one running into grooves, with an aperture in it for the admission of ballots. The outer cover also runs into grooves, and is so framed at the lock end, that when closed, the inside cover cannot be seen or touched. The outer cover has no aperture. The lock was apparently in good order; is of brass, and not what is called an ordinary lock. Your committee, from an inspection of such ballot-box, was led to the conclusion that without the possession of a key fitted to open the lock after it was locked, sealed and taped with a view to security, any abstraction of ballots from it, without leaving unquestionable marks of violence upon the box, would be impossible. That nothing short of possession by the person designing fraud upon it, of key, seal, and the other items used for security (as stated by the inspectors), could enable him to consummate a fraud upon it without certain detection. The committee have arranged the testimony applying to the ballot-box, and the inspectors of the second ward in such manner that this House may see at once, the charges of the petitioners as supporter by testimony, and the refutations of the sitting member, also supported by testimony. And first, they refer the House to the testimony of John A. Barhydt, marked No. 8; also to Alonzo B. Corey, marked No. 34; Joseph Shurtliff, marked No. 35; and John R. Edick, marked No. 10, witnesses produced on the part of the petitioners. They also refer the house to the testimony of David M. Moore, marked No. 15; John Lassells, marked No. 16; John A. Mercelis, marked No. 17, inspectors of election. John Van Santvoort, marked No. 18; John Hull, Jr., marked No. 19; clerks of election. Also to the testimony of Henry Mercelis, marked No. 24; William E. Russell, marked No. 25; and David

Leavitt, marked No. 26; being testimony applying to the care and custody of the ballot-box. Theodore L. Burgess appeared before your committee and testified that he did not know for whom he voted for member of Assembly at the last general election held in the second ward of the city of Schenectady; intended to vote for Theodore W. Sanders; could not say he voted the ticket he received of Adrian V. S. Barhydt; voted first day of election; was crowded up to the poll; was very much under the influence of liquor at the time that he received tickets from both political parties. Your committee would refer the House to the testimony of Adrian V. S. Barhydt, marked No. 7, relative to the vote given by Burgess. Barhydt testified that Burgess voted on the morning of the first day of election and that he was not challenged. The poll list of the last general election of said ward, kept by the clerks of the election has been produced before your committee and their identity proven; also the list of persons challenged and sworn, certified by the inspectors of said ward as required by law, has been produced and proven. Your committee refer the House to the testimony of John Hull, Jr., marked No. 28, one of the clerks of election who testified that one hundred and six votes had been received at noon of the first day of election. Your committee on an examination of the poll list kept by the said John Hull, Jr., above referred to, find that the name of Theodore Burgess, who was proven to your committee to be the same person called in the testimony of Adrian V. S. Barhydt, Theodore L. Burgess, must have voted in the afternoon of the first day of said election, as his name stands at number one hundred and forty-three on the poll list, and by an examination of the list kept and certified by the inspectors, of the persons challenged and sworn, it appears that Burgess was challenged, and took the oath prescribed by section 7 of chapter 389 of the Laws of 1869, also the oaths prescribed by section 18, of title 4, chapter 6, part first of the Revised Statutes.

Your committee, on referring to the official statement of the board of county canvassers, a copy of which is included in this report, find that, allowing to John I. De Graff the fifty-six votes admitted by the counsel of Theodore W. Sanders, in addition to those that have been proven by the witnesses, still Theodore W. Sanders would have the greatest number of votes for member of Assembly in the county of Schenectady.

The committee have given to the House the evidence in this case, and being sensible that nothing less than the purity of our elections is involved in the question, observe, that from a careful examination of all the testimony, it appeared to your committee that the election in the second ward in the city of Schenectady was legally and properly conducted by the inspectors, and that there was no evidence by which any fraud or improper conduct could be imputed to the officers of the board of election.

The evidence of David M. Moore, one of the inspectors (the political friend of John I. De Graff), whose character was admitted by the counsel for the petitioners to be good and unquestionable (together with the other testimony taken in the case), appeared to your committee to place this affair in its true light. He saw what took place at the poll of election, heard the insinuations that were made, was an attentive observer of all that transpired, voted for John I. De Graff; observed, as the electors presented their ballots to the inspectors to be deposited in the ballot-box, that some of them had the appearance of having been erased with ink; that on the final canvass about thirty ballots were found in the Assembly box with the name of John I. De Graff erased and the name of Theodore W. Sanders written thereon; that they had the same appearance which he observed when they were presented by the electors; that he did not believe a single vote was changed in the Assembly box from the time they were deposited there by the electors to the final canvass.

A majority of the committee, being fully satisfied of the fairness and purity of the said election, respectfully offer for the consideration of the House, the following resolution:

Resolved (as the sense of this House), That they are not satisfied that fraud or corruption has been practiced upon the ballot-box for member of Assembly at the late general election in the second ward of the city of Schenectady, and that the prayer of the petitioners ought not to be granted.

T. H. PORTER.
DANIEL TOFFEY.
C. MERSEREAU.

Resolutions laid on the table. On motion of Mr. Nichols,

Ordered, That said resolutions be laid on the table.

Assembly Journal, 1840, pages 831 and 1832.

Report laid on the table.

On motion of Mr. I. H. Porter,

Ordered, That said report and resolution be laid upon the table.

MINORITY REPORT OF COMMITTEE ON PRIVILEGES AND ELECTIONS.

Mr. Nichols, from the minority of the standing committee on privileges and elections, reported as follows:

Report of the minority of the committee on privileges and elections, on petitions of electors of Schenectady county.

The undersigned from the minority of the committee on privileges and elections to whom was referred the petition of electors of the county of Schenectady, praying for an investigation of certain alleged frauds committed upon the ballot-boxes in the second ward of the city of Schenectady, at the late general election, and that John I. De Graff be permitted to a seat in the present House of Assembly in the place of Theodore W. Sanders, the member returned, report: That the committee have had the said matter in charge, and although great delay has been occasioned by the manner in which the investigation has been conducted, yet the undersigned would state that they have embraced the earliest opportunity after the conclusion of the examination, to present to the House the views of the minority of the committee.

The petitioners, among other things, represent that they believe a most glaring fraud was committed in the said second ward of the city of Schenectady at the last general election; and among the evidences to sustain such a belief, the petitioners state that upon a canvass of the votes in the said second ward, that Theodore W. Sanders, the member returned, had his name on one hundred and ninety-seven of the ballots; and that John I. De Graff, for whom they claim a seat in this House, had his name upon but eighty-seven of the ballots in said ward; thereby giving Mr. Sanders a majority of one hundred and ten votes in said ward; and that since the said canvass, one hundred and seven of the voters in the said ward, whose names were upon the poll-list and who voted at said election, had been sworn before officers authorized to administer oaths, and testified that at the said election they had voted in said ward, and had voted for John I. De Graff for member of Assembly, and had seen their votes deposited in the ballot-box in said ward.

In the progress of this unpleasant and responsible investigation, the committee have most earnestly labored to arrive at the truth, and to divest it of all party feelings or considerations.

The undersigned have not deemed it necessary in the report of their conclusions from the testimony to detail the whole of the testimony (it being very voluminous); but they have set forth the substance of so much of that which has a bearing upon the case, as to show the correctness of their conclusions.

It appears that the board of inspectors in the said second ward consisted of John A. Merselis, David M. Moore and John Lissells, appointed by the common council of the city of Schenectady, and two clerks, John Hull, Jr., and John Van Santvoord, appointed by said inspectors; it further appears that three ballot-boxes were kept by said inspectors; one for the reception of votes for the proposed amendment to the constitution, one for the reception of votes for three Senators, and one for votes for members of Assembly; these boxes were constructed with two slides at the top, sliding in at the end of the box; the upper of which slides, when closed, is fastened

by the bolt of a common lock entering it; which lock, almost any ordinary key of the proper size will unlock; through the lower slide is an aperture in the center, cut large enough to admit the ballots through into the box; and upon this lower slide was also the words: County, State, or Constitution, to designate the box; by unlocking these boxes both these slides can be drawn out; in addition to this common lock, the only other security taken by the inspectors on the first day at noon, was the putting a seal of sealing wax upon the upper slide of the box, and another upon the end of the box below, or on one side of the keyhole; and putting a strip of paper about one and a half inches wide from one seal to the other drawn over the key hole; and additional sealing wax on top of the paper, with an impression made upon the same with a stamp, so that no access could be had to the key hole but by tearing the paper or removing the seal.

Two of the inspectors, Messrs. Mereselis and Moore, having no suspicion of fraud cast upon them by the petitioners, or by the testimony, have not, except when called upon as witnesses, attended the investigation. The other inspector Mr. Lassells, against whom the petitioners allege some suspicious circumstances, has attended and interested himself in the examination, as a matter personal to himself; and for this reason, much of the testimony and most of the issues which have rendered the examination tedious and embarrassing, relate to the character and conduct of this inspector.

On the question of the conduct of Mr. Lassells, and also as to whether he had the county box during the recess of the first day of election at noon, there is much conflicting and contradictory evidence. He swears positively before the committee that he did not have that box during the recess at noon of the first day; and yet he informed one or two persons, on that day, that he thought he did have it. Mr. Hull (one of the clerks) says that he supposed Mr. Lassells took the county box at noon of that day, and remained of that opinion until they were about to close the poll at night, when a

dissension arose between the members of the board as to which of them had the custody of the county box at noon, Mr. Lassells then denying that he had taken it. The other inspectors both say they supposed Mr. Moore took it on that day at noon, but they are not positive; and yet it appears they entertained a different opinion in the afternoon of that same day, and had a discussion on that subject, which, it seems by Mr. Hull's testimony, was settled by agreement, upon the denial of Mr. Lassells, and not upon any positive knowledge of the fact.

John A. Barhydt, one of the tally men, and who remained in the room with the inspectors, swears positively that he was appointed by a committee to keep a tally roll of the voters, and to prevent the inspector, Mr. Lassells, from taking the county box, if he could help it; that for this reason he (the witness Barhydt) kept his eye upon the county box from before the time it was closed until it was taken away; and he says that he is positively certain that Mr. Lassells did not take the county box at the recess of the first day at noon; that after the boxes were closed, Mr. Lassells took the State box and placed it on the top of the county box, then drew them toward him; witness supposed he intended to take both boxes. He (Barhydt) then proposed to Mr. Lassells that, as there were three inspectors, each should take a box, to which Mr. Lassells assented. Lassells then took the State box and shoved it toward Mr. Moore, and took the county box under his arm and walked out of the room. The box taken by the inspector, Lassells, at noon of the first day, he says, was taken by him to his own house, and put in a room up stairs, and he locked the door of the room at the time he placed the box there. Henry Merselis, another witness, states that he went from Mr. Lassells' house with him, when he (Lassells) went to the poll in the afternoon, and that when the boxes were opened, he discovered that the box which Lassells had was the State box; that he noticed it particularly, to know which box Lassells had. Lassells also told this witness he thought he had the county box.

John R. Edick, another witness, states that he was present when

Lassells brought back the box in the afternoon of the first day; that when he was about to open them, or after they were unlocked and before they were opened, Lassells commenced shoving and changing the position of the boxes back and forth upon the table; witness then spoke to Lassells, and told him he was good upon the shuffle board. Such is the conflicting testimony on this point.

Neither of the inspectors, except Mr. Lassells, are positive as to who had the county box at noon of the first day. He is positive he had the State box, although he informed two or three persons that day that he thought he had the county box. The boxes were made in his (Lassells') shop. John A. Barhydt is positive Lassells took the county box, and gives his reasons why he watched so closely, with directions expressly to prevent it. Henry Merselis, on the other side, is equally positive he had the State box and he was also anxious and watched to discover. John R. Edick shows that Lassells performed a movement with the boxes by changing their position before they were opened, that would prevent Henry Merselis from knowing which box Lassells brought to the poll.

All the inspectors are of the opinion that the boxes, secured as they were, could not have been violated at the recess without their being able to discover it; and yet your committee have no doubt upon their minds (from recent experiments made to ascertain the fact, and also from the testimony of Solomon Drullard, that he had tried the experiment on a box secured in the same manner) that the seals and papers may be removed, the boxes violated, and the seals so replaced as to wholly avoid detection, if in possession of a person so basely disposed. The undersigned cannot, therefore, give much weight to the evidence that these boxes were secure from violation by being sealed in the manner described by the inspectors, inasmuch as it appears that they were not secured strong enough to prevent above twenty of the votes deposited therein for John I. De Graff from getting out; and most certainly a security which would prevent an individual from getting in would have prevented ballots from getting out.

Although the investigation has been prolonged and embarrassing, and though many of the questions, upon the various issues which were presented, are left by conflicting testimony still in doubt and uncertainty, yet, upon the important question with which the committee were charged, the undersigned regret to state the testimony is such, the conclusion is irresistible, and that they are constrained to say, that they believe no reasonable and unprejudiced man can doubt that a most gross and corrupt fraud has been practiced upon the ballot-boxes, in the said second ward of the city of Schenectady, at the late election for member of Assembly.

It is not only remembered to have been so generally, but is also drawn from the proofs in this case to have been so, in the city of Schenectady in particular, that the last election was a warm and closely contested issue between the two great political parties of the day; that the individuals composing and supporting each of these parties seem, with very few exceptions, to have been previously as well as subsequently distinctly known and recognized. Each of these parties had, previously to the election, furnished themselves with a poll list of the voters in said ward; each of these parties had a tallyman attending the board of inspectors during the three days of election, to check off voters as they presented their ballots, and each of said parties had, therefore, a knowledge, within a few votes of certainty, of what the result must have been in the said ward; and both parties, at the close of the polls and since, seem equally unable to account for the extraordinary majority which the votes in the ballot-box at the time of canvass gave to Mr. Sanders.

But the undersigned have still greater certainty of the correctness of their conclusions than this. The original poll list, as kept by the clerks at the election, has been before the committee. Fifty-six of those persons whose names were on the poll list, from their own political character, were admitted by both sides (without other proof than their affidavit, annexed to the petition), as having voted

for Mr. De Graff, in the second ward, the names of which electors are hereunto annexed, marked B. Fifty-three other persons, whose names are upon said poll list, have been sworn before the committee, and state that they severally voted for John I. De Graff, for member of Assembly in said ward, and saw their votes deposited in the ballot-box, the names of which electors are also hereunto annexed, marked C; making, in all, the number of one hundred and nine electors as having sworn they voted for John I. De Graff, for member of Assembly in said second ward; and only in relation to two or three of the voters thus sworn or admitted, has there been any doubt or contradiction.

Here, then, in the opinion of the undersigned, is the most unerring and conclusive certainty that their conclusions are correct; that at least from one hundred and six to one hundred and nine of the voters in that ward, known both before and since by both parties as the political friends of Mr. De Graff, and now before the committee, and previously by affidavit, having sworn to the fact, that they did so vote for Mr. De Graff; that his name was seen upon the ticket they voted, and that they saw said ticket deposited in the ballot-box. And yet, but eighty-seven of such votes for Mr. De Graff were found on the canvass. There is some testimony before the committee, throwing a doubt whether the votes of Theodore L. Burgess and Nelson Hall, two of the voters in said ward, and witnesses before the committee, were actually given for John I. De Graff; but as the proof that the votes of at least one hundred and six or one hundred and seven voters in said ward, not only intended but actually did vote therein for John I. De Graff, the undersigned cannot doubt, nor does the testimony in the case warrant any such doubt. How the remainder of about one hundred and fifty voters, whose names are also upon the poll list, voted at said election, the undersigned have no knowledge, as they have not been produced or sworn before the committee. Admitting that every one of these voted for Mr. Sanders, still the fraud would remain unexplained, and the result equally uncertain.

The undersigned, however, feel bound to say, that they have been unable to bring home this fraud with any degree of certainty upon any one individual; and there has not been the least evidence to charge the same upon the board of inspectors, while acting together as such; and it is admitted by both parties and witnesses, that against two of the inspectors, Messrs. Moore and Merselis, there is neither a charge nor suspicion of fraud in the transaction; it has also been proved that Mr. Lassells has heretofore sustained a fair character, but the undersigned have not deemed it their duty to report that no fraud has been committed, merely because it has not been proved that the person committing it did, or did not, take with him a witness to the first transaction, or because it has been done so secretly and cunningly, that detection is not absolutely certain.

All the inspectors and clerks of the poll have been before the committee and testified in relation to the manner of conducting the election; of keeping and securing the boxes; and also as to whom the custody of the boxes were intrusted; from all of whom it is satisfactorily settled (in the opinion of the undersigned), that this fraud must have been committed during the recess or adjournment of the board on the first day at noon; it also appears that John A. Merselis, one of the inspectors, did not have the custody of the county box, either during the recess at noon or after the adjournment at night of any of the days of election; it also seems to be established beyond doubt, from the testimony of all the board of inspectors and others, that the said county box, after the recess at noon of the first day, was kept in the possession and custody of David M. Moore, one of the board of inspectors; and that during the time it was in his custody, he testifies, that it was kept safely locked up in a drawer of his house, and could not have been rifled, as he thinks, nor access had to it, except by himself; it was also admitted on both sides as well as proved, that the character of Mr. Moore, as well as Mr. Merselis, is above suspicion; and Mr. Moore is the political friend of Mr. De Graff, and voted for him at said election.

The custody of the county box during the recess of the first day, at noon, is involved in some doubt; the three boxes which were used at the election, and which were distinguished, as before stated, by the following labels on the inner cover, Constitution, State and County, were so very similar and alike in their appearance, that when the upper slide was closed, neither of the inspectors, except Mr. Lassells, were able to distinguish the one from the other, and neither of the inspectors, therefore, except Mr. Lassells, swears with certainty who had the custody of the county box during the recess of the first day at noon. But inasmuch as all the circumstances combine to show that the fraud was committed during this recess, the undersigned have no doubt that Mr. Lassells must have taken this box at that time; and when we take into consideration the situation of Mr. Lassells' house, it having three front doors, with cabinet ware rooms above and below, that he had at the time in his employ, several workmen, and others who have not been called upon as witnesses, who could have had access to the said box, either with or without his knowledge; that these ballot-boxes were made in his shop and were kept there a part of the time; that he and his workmen were familiar with the locks of these boxes, and knew what keys would unlock them, and actually had so unlocked them; that he, himself, after leaving the ballot-box in his upper room, left his house long enough to have had this fraud committed; that one of his workmen, who was taking an active part in the election, swears that he stood in the front door of one of the lower ware rooms, half an hour or more, watching his return, and then went to dinner without seeing him; that he, himself, was mysteriously absent from his dinner with his family, on that day; that he did not dine at all on that day; and that he has not accounted for his absence, nor shown where he was during all this time. The undersigned consider all these circumstances, connected with others, more than establish a probability that during this recess some evil disposed person committed this daring fraud; and also, inasmuch as no other such an exposure or opportunity was presented, during said election, for the fraud to have been committed.

Another proof that this ballot-box has been corruptly violated, is the fact that but one ballot was found on the canvass on which the name of Mr. Sanders had been erased, and the name of Mr. De Graff written upon it; and yet Lawrence Slover swears he voted a ticket of that kind in the forenoon of the first day; and Abraham Lewis swears he voted such a ticket on the second day of the election. The inspectors testify that but two tickets, which were entirely written, were found on the canvass; and yet, Peter V. Peck, Stephen Cooper and Simeon M. S. Swart, all swear they voted written tickets; the two former swear they voted in the forenoon of the first day; as to the latter, it does not appear when or for whom he voted. If this fraud was committed, the loss of these votes is accounted for.

It is shown before the committee, that on the canvass there were nearly thirty tickets on which the name of Mr. De Graff in print had been erased and the name of Mr. Sanders written thereon; of the one hundred and nine voters that have sworn that they voted for Mr. De Graff, but two of them have voted altered tickets; two others say they voted entirely written tickets; all the others say they voted the printed ballot without any erasures and with Mr. De Graff's name thereon; from whence, then, came all these erased ballots? Not from the one hundred and nine who swear they voted for Mr. De Graff (excepting the two); the inspectors say they noticed from the ballots, at the time of voting that there were several erased ballots; but it is neither proved nor pretended to be proved that any of the one hundred and nine who swear they voted for Mr. De Graff (excepting the two above named), did vote any such ballot; the remainder of them are left in the same mystery that involves the whole subject.

Among the many regrets which the proofs in the investigation of this important subject have brought to the undersigned, they cannot forbear to mention one, and to feel it to be their duty to animadvert upon it; and that is, the corrupt and corrupting influence produced in the community by the betting on elections; and the

regret is the more painful, when we are compelled to bring this corrupt practice home to an inspector, who is charged with having the custody of the ballot-box at the very time this fraud is believed to have been committed; such a known violation of duty, as well as of law, in the conduct of an inspector of election, evinces a total disregard, not only of public opinion, but to that high and honorable feeling so necessary to the proper discharge of official duty; an inspector who could permit his political feelings so far to control and overrun his prudence must be an unsafe depository of so sacred a trust as the ballot-box.

The undersigned cannot believe that the additional oath of the inspectors before the committee, that they severally had committed no fraud adds anything to the weight of evidence in the case; they had taken the same solemn obligation before the election, that they would well and truly perform their duty; and if this oath had been violated by either of them at the election, it is not probable it would be confessed before the committee now. If it be said to be too severe or uncharitable not to treat all the inspectors with equal censure, we reply that they are not equally contradicted by testimony, facts and circumstances, and have not all been equally imprudent.

The original poll list of the voters in the second ward having been before the committee, the petitioners have called as witnesses (including those admitted), whose names are thereon to a number exceeding more than twenty who swear they voted for John I. De Graff for member of Assembly, than the ballot-box at the time of the canvass gave to that candidate, the whole number of votes in the ballot-box having agreed with the poll lists. How then can this change of votes to such an extent have taken place? How can these votes have escaped from the box? How come an equal number of other votes to be made to supply their place? What became of one of the written ballots deposited in that box in the forenoon of the first day of election. The inspectors swear but two such votes were found at the canvass. What became of the two tickets with Mr.

Sanders' name erased, and Mr. De Graff's written thereon? But one such vote was found in the box at the canvass. All of these but one were voted in the forenoon of the first day. Will it be believed that such a number of intelligent electors in one ward, and all on one side, could have been so deceived or cheated? Even upon such a supposition, a gross fraud upon the electors must have been practiced; it can neither be accident, mistake, or error of judgment. If, then, the witnesses who have testified that they voted for Mr. De Graff, are to be believed, and there having been attempts to impeach but two or three of them, must not the weight of evidence determine this case as it would any other case in a court of justice? If this is to be the rule by which certainty is to be determined, then the undersigned are most clearly of the belief that at the late election held in the second ward of the city of Schenectady, a gross fraud has been committed upon the ballot-box containing the votes for member of Assembly. To come to any other conclusion upon the facts before us, would be treating with contempt the solemn oaths of a large number of the electors of said ward, to sanction corruption and gross negligence, with no better excuse than to disbelieve its existence, because the wilful perpetrator cannot with certainty be convicted, and to strike a fatal blow at the only security of our liberties, the purity, the unsuspected purity of the ballot-box.

The undersigned being therefore entirely satisfied that such a fraud has been committed upon the ballot-box in question, the only conclusion that can follow in the premises is, that no dependence can be placed upon the canvass of the votes for member of Assembly in the said second ward.

The moment that uncertainty is proved upon it, there is no power in this House to determine how far that uncertainty extends; nor should it, in the opinion of the undersigned, ever be tolerated to be established as a rule, that the party proving a fraud shall be limited to the extent of the fraud as proved, or shall be allowed the benefit of his proof no farther than he has established it; it is believed to

be a maxim in morals as well as in law, "false in part, false in the whole." In the opinion of the undersigned, falsity is already stamped upon this canvass; no corrupt canvass can be rendered pure by the action of this House. Nothing but the total destruction of this false and uncertain canvass would comport with the true dignity and character of an honorable House. Let the belief be entertained that this House is willing to sustain the seats of its members upon fraud, falsehood, or even upon *uncertainty*, and the right of suffrage so highly valued, so dear to every citizen, so important to the liberties of this republic, is but an empty name, a mockery and pretence.

The questions whether the returned member shall still hold his seat, or whether the prayer of the petitioners shall be granted, or whether the said seat be not entirely vacated, are matters of small moment, when taken into the account of this momentous question of the purity of the elective franchise. If even suspicion be allowed to exist here; if the most rigorous scrutiny be not adopted; if the whole basis upon which an elective government can be sustained is permitted to receive so deadly a blow; if that "righteousness which exalteth a nation" is to be disregarded in high places, then may we despair of the perpetuity of our free institutions; the death blow will have been struck to the sovereignty of the people.

It appears from official certificates, that the returned member, Théodore W. Sanders, has a majority of only fifty-five votes over John I. De Graff in the county of Schenectady. It also appears from the canvass of the said second ward, that said Theodore W. Sanders had a majority in said ward of one hundred and ten votes over the said John I. De Graff. Setting aside the votes in the Assembly box of that ward as fraudulent or uncertain and the remaining votes would entitle the petitioners to have their prayer granted by this House.

The undersigned therefore ask leave to offer the following resolutions.

S. NICHOLS,
D. BELLINGER,

Resolved (as the sense of this House) That they are satisfied that fraud or corruption has been practiced upon the ballot-box for member of Assembly, at the late general election held in the second ward of the city of Schenectady.

Resolved (as the sense of this House), That Theodore W. Sanders, the member of Assembly returned from the county of Schenectady, ought not longer to be entitled to his seat in this House; that the prayer of the petitioners ought to be granted; and that John I. De Graff be admitted to a seat in the place of the said Theodore W. Sanders.

Assembly Journal, 1840, pages 829-832.

See testimony accompanying reports, Assembly Document, 1840, No. 291.

RESOLUTION TO CONSIDER THE SCHENECTADY CONTESTED ELECTION CASE.

IN ASSEMBLY, *April 29, 1840.*

On motion of Mr. Sanders:

Resolved, That this House will, at ten o'clock to-morrow morning, take up and consider the report of the standing committee on privileges and elections, in relation to the alleged fraud in the second ward of the city of Schenectady, at the last general election; and that they will continue the consideration of the same on each day at ten o'clock until the same shall be finally disposed of.

Assembly Journal, 1840, page 1198.

REPORT CONSIDERED.

IN ASSEMBLY. *April 30, 1840.*

The House proceeded to the consideration of the resolution reported by the majority of the standing committee on privileges and elections, to which was referred the petition of sundry electors of the county of Schenectady, praying for investigation of certain alleged frauds committed upon the ballot-boxes in the second ward of the city of Schenectady, at the late general election, and that John I. De Graff be admitted to a seat in the present House of

Assembly, in place of Theodore W. Sanders, the returned member, which resolution was in the words following, to wit:

Resolved (as the sense of the House), That they are not satisfied that fraud or corruption has been practiced upon the ballot-box for member of Assembly, at the late general election, in the second ward of the city of Schenectady; and that the prayer of the petitioners ought not to be granted.

Debate was had upon said resolution, when

Mr. A. G. Chatfield moved to amend the same, by striking out all after the word "Resolved," and inserting so that the same will read as follows, to wit:

Resolved (as the sense of this House), That they are satisfied that fraud or corruption has been practiced upon the ballot-boxes for member of Assembly at the late general election, in the second ward of the city of Schenectady.

Resolved (as the sense of this House), That Theodore W. Sanders, the member of Assembly returned from the county of Schenectady, ought not longer to be entitled to his seat in this House; that the prayer of the petitioners ought to be granted, and that John I. De Graff be admitted to a seat in the place of the said Theodore W. Sanders.

The Speaker put the question whether the House would agree to the said motion of Mr. A. G. Chatfield, and it was determined in the negative.

Ayes 38. Nays 61.

REPORT ADOPTED.

Debate was continued on the said resolution offered by the majority of the standing committee on privileges and elections, when Mr. Speaker put the question whether the House would agree to the said resolutions, and it was determined in the affirmative.

Ayes 60. Nays 39.

Assembly Journal, 1840, pages 1204, 5, 6.

Absalom E. Miller, Relative to his Right to a Seat.

COUNTY OF NEW YORK,
IN ASSEMBLY, *January 5, 1841.*

Mr. Ellis Chatfield offered for the consideration of the House, a resolution in the words following, to wit:

Resolved, That Mr. Absalom *E.* Miller who presents a certificate from the board of county canvassers of the city and county of New York, declaring Absalom *A.* Miller to have been elected a member of Assembly from that city and county, be permitted to be qualified and take his seat as a duly elected member of Assembly from the said city and county.

The question was then put: "Is it the pleasure of the members now, to consider the said resolution of Mr. Ellis Chatfield?"

Debate was had on said question, when Mr. Holly moved to lay the question on the consideration of the said resolution on the table.

The question was put to the members, whether they would agree to the said motion of Mr. Holly, and it was determined in the affirmative.

Assembly Journal, 1841, page 7.

IN ASSEMBLY, *January 6, 1841.*

Mr. Ellis Chatfield called for the consideration of his resolution, that Absalom *E.* Miller bearing a certificate of election declaring Absalom *A.* Miller to be elected, be allowed to be qualified and take his seat as Absalom *E.* Miller, duly elected member of Assembly from the city and county of New York.

Mr. Speaker put the question, whether the House would now proceed to the consideration of the said resolution, and it was determined in the affirmative.

Thereupon, on motion of Mr. Ellis Chatfield,

Ordered, That the said resolution be referred to the standing committee on privileges and elections.

Assembly Journal, 1841, page 46.

IN ASSEMBLY, *January 9, 1841.*

Mr. Richmond, from the standing committee on privileges and elections, to which was referred the resolution authorizing Absalom E. Miller to take his seat in the House, made the following

REPORT OF THE COMMITTEE ON PRIVILEGES AND ELECTIONS, ON
THE RESOLUTION OF THE ASSEMBLY, RELATIVE TO THE RIGHT
OF ABSALOM E. MILLER TO A SEAT IN THE HOUSE.

Mr. Richmond, from the committee on privileges and elections, to whom was referred the following resolution of the Assembly, to wit:

Resolved, That Mr. Absalom E. Miller, who presents a certificate from the board of county canvassers of the city and county of New York, declaring Absalom A. Miller, to have been elected a member of Assembly from that city and county, be permitted to be qualified, and take his seat as a duly elected member of Assembly from the said city and county, reports: That from the evidence adduced before the committee, it appears that Absalom E. Miller, the person claiming a seat as a member of this House, was nominated as a candidate for member of Assembly, for the city and county of New York, by a nominating committee in said city, at the same time and in the same manner with the members from said city and county, who have received their certificates of election, and been admitted to their seats. A printed ballot or ticket containing the names of thirteen candidates for the Assembly, embracing the names of the present sitting members, and also the name of Absalom A. Miller, was distributed among the electors, and received a majority of the suffrages of that county. No person answering to that name has appeared to claim his seat. Nor have your committee, after the most diligent inquiry they have been able to make, ascertained that there is any person of that name in the said city and county. It appears by the testimony of the Hon. Edmond J. Porter, that he was personally acquainted with the petitioner, Absalom E. Miller, before the election, and that he voted for him by the name of

Absalom A. Miller, as the name was printed, and that the person intended by him was the petitioner. The affidavit of five persons who were members of the nominating committee, who formed the tickets on which was the name of Absalom A. Miller, together with a similar certificate of the chairman and secretaries of the general nominating committee, shows that the petitioner was the person intended, and understood to be nominated by them. .

The board of county canvassers of the city and county of New York, have, by a formal resolution, expressed their opinion that the name of Absalom A. Miller, as voted at the general election, held on the 4th day of November, 1840, was intended for Absalom E. Miller, the petitioner.

From this evidence, your committee have no difficulty in coming to the conclusion that the petitioner is the person intended and voted for, by electors of the city and county of New York, at the general election, on the 4th day of November last, under the name of Absalom A. Miller.

The Constitution provides that each House shall be the judge of the qualification of its own members.

This clause has been always construed to extend not merely to their qualifications as to age, citizenship, etc., but also to embrace all questions relating to the fact of their election.

The essence of an election is the will or intention of the electors. All the rules on the subject are for the purpose of ascertaining their intention.

The manner in which the will of the people shall be expressed is prescribed by law, and ought to be observed; yet in construing those laws, the object of them should be kept constantly in view. If the intention of the electors is ascertained, although all the regulations may not be literally complied with; still the very object of the regulations themselves is attained.

The statute requires that the ballot shall contain the name of the person for whom the elector intends to vote. This, however, has not been construed literally, either by the State canvassers or by

our courts of justice. Ballots are constantly allowed which do not contain the name, but an abbreviation of the name. The supreme court has referred questions of that kind, and even when nothing of the Christian name but the initial letter was used, to a jury, to ascertain, from extrinsic evidence, what was the intention of the elector. The principle is established, that the statute does not require the name to be written out in jail. It is also established, that the intention of the elector shall govern, and that this intention may be ascertained by extrinsic evidence. The principle would, doubtless, not be extended to cases where the name does not identify the party at all, but would be limited to those cases where the similarity of the name used to the true name, furnishes a strong presumption of the identity of the person intended.

Your committee are impressed with the belief, that questions of election to this House are left in broad terms by the Constitution to be decided by the House. That in all such questions, it is the duty of the House to look mainly to the intention of the electors, and, if possible, to carry that intention into effect. And that for that purpose, it should give the most liberal and enlarged construction to the provisions of the statute.

This case is a peculiar one; the discrepancy in the names is slight; and although it might be considered material in the precision of legal proceedings, yet it is respectfully submitted that it ought not so to be held in this legislative inquiry; where the identity of the person is clearly ascertained from other evidence, and where such a construction would produce an irremediable injury.

No slight reason should induce representatives to impair the sacred right of representation. Nothing but the most clear and imperative rules of established law can justify a legislative body in depriving any portion of the people of their equal voice in enacting the laws which they are compelled to obey.

Deeply impressed with these views, your committee ask leave to offer the following preamble and resolution:

Whereas, This House is convinced, by the evidence before it, that the person intended by the name of Absalom A. Miller, con-

tained in the return of the board of canvassers in the city and county of New York, is Absalom E. Miller, and that the said Absalom E. is the person intended by the name of Absalom A. Miller, as printed on the ballots of a majority of the electors of the said city and county; therefore,

Resolved, That the said Absalom E. Miller is entitled to a seat in this House, and that he be admitted and sworn a member thereof, for the city and county of New York.

Assembly Documents, 1841, vol. 2, No. 17. See Documents, pages 5, 6, 7.

Mr. Holly moved to amend the said resolution by adding at the ending thereof the words, "and that he receive the pay of a member from the first day of this session inclusive."

Mr. Speaker put the question whether the House would agree to said motion of Mr. Holly, and it was determined in the affirmative.

MR. MILLER AWARDED THE SEAT.

The question then recurred upon the said preamble and resolution as amended, which were again read.

Mr. Speaker put the question whether the House would agree to said preamble and resolutions as amended, and it was determined in the affirmative.

Mr. Absalom E. Miller then appeared in the Assembly chamber.

Thereupon, Mr. Speaker duly administered to him the oath of office prescribed by the constitution.

Assembly Journal, 1841, pages 65 and 66.

Case of George J. J. Barber and Abraham Acker.

SECOND DISTRICT, CORTLAND COUNTY — PETITION OF ABRAHAM ACKER PRESENTED.

IN ASSEMBLY, *January 8, 1845.*

Mr. Speaker presented the petition of Abraham Acker, representing that he is entitled to a seat as member of the Assembly from the

county of Cortland, which was read and referred to the committee on privileges and elections.

Assembly Journal, 1845, page 51.

REPORT OF COMMITTEE IN FAVOR OF GEORGE J. J. BARBER.

IN ASSEMBLY, *January 21, 1845.*

Mr. Nevin, from the committee on privileges and election, to which was referred the petition of Abraham Acker, of the county of Cortland, praying that he may be permitted to take his seat as a member of this House in the place of George J. J. Barber, make the following report:

IN ASSEMBLY, *January 21, 1845.*

REPORT OF THE COMMITTEE ON PRIVILEGES AND ELECTIONS, ON
THE PRAYER OF ABRAHAM ACKER.

Mr. Niven from the committee on privileges and elections, to whom was referred the petition of Abraham Acker of Cortland county, praying that he may be permitted to take his seat as a member of this House, in place of George J. J. Barber, reports, that your committee have given this matter a patient investigation. A large mass of testimony, taken on the spot, in accordance with the provisions of the statute, before the first judge of the county of Cortland, and transmitted by him, under seal, to the Clerk of the House, was laid before us; and in addition thereto, one witness on the part of the sitting member was sworn and examined before us.

The testimony, whether written or oral, was taken in the presence of the parties and their counsel; and every facility afforded for eliciting facts bearing upon the case. Much of the evidence adduced is of a perplexing and contradictory character; yet in thus speaking, the committee do not wish to be considered as reflecting in any degree upon the moral character of the witnesses.

Probably we should not have expected it to be otherwise under the circumstances. For however honest men might be, the exciting nature of the contest, during which the transactions testified of,

took place; and the additional fact that the canvass was so very close in Cortland county (Mr. Barber being returned by but *one* majority), may well induce us to suppose that party *bias* and antagonist feelings and sympathies, would lead men to form adverse opinions as to the facts and circumstances connected with the case.

Your committee in examining the matter, beset, as it was, with difficulties and doubts, decided that where uncertainties existed, the present sitting member should be entitled to the benefit of such doubts. This we felt to be just and right, as well as in accordance with the genius of our institutions and the principles of law.

In the testimony adduced before your committee, it was ascertained that the parties had made four distinct points of controversy in reference to the election returns of said county of Cortland.

First. That the petitioner avers, that in one election district in the town of Homer, on opening the ballot-box, a double ballot was discovered, or two ballots folded together; that they were for the whig candidates, and that they were canvassed and counted contrary to the provisions of the statute.

The second point is made by the sitting member, Mr. Barber, who introduces testimony in reference to one vote being given for Abraham Acer, which was allowed to the petitioner.

The third allegation is made by Mr. Barber, who proves by an inhabitant of the town of Virgil, that he, the deponent, voted for Barber, by erasing Acker's name from a democratic ticket, and inserting Barber's thereon, and that when the tickets were canvassed no such ticket was found.

The fourth point is also made by Mr. Barber, who charges that in the town of Solon, in said county of Cortland, two democratic ballots were found folded together upon canvassing the votes. The testimony in reference to this charge is so very ambiguous as to induce the committee to dismiss it at once.

Your committee are of unanimous opinion, after carefully surveying the whole ground, that the only point worthy of being entertained, is in reference to the transactions in the town of Homer.

The testimony of twelve witnesses was laid before us, as to the point at issue here; they generally agree in the statement that one of the clerks of election, in district number three in the town of Homer, while engaged in counting the ballots, either the first, second or third time of such counting, discovered two State tickets, one within the other. He stated it to the board of inspectors, and was by them desired to lay it aside until they finished counting. He held it out in such a way as that all could see it.

One electoral vote was also found in the State box, which was laid aside until the electoral ballots were examined. Upon comparing the ballots in the State box with the poll list (excluding the electoral ticket), they were found to be *two short* of the number on the poll list. The suspicious ballots were then examined and judged by all the board, from the position in which they were, to have got so by accident, and were consequently counted as separate ballots.

The challenger for the democratic party, who was at the table at the time, swears that he then expressed his opinion that it was a correct decision, and is of the same mind yet. From all that appears in evidence it would seem that all present at the time were satisfied with the judgment of the board.

The ballots were supposed to be those of the whig party at the time, from the caption and color of the paper, but it was subsequently discovered that there were democratic tickets in the box, entirely similar in these respects, and consequently no positive certainty exists as to whose name was on the disputed ballots, Mr. Barber's or Mr. Acker's.

From this condensed view of the facts brought out is evidence, it will readily be perceived, as your committee think, by this House, that the conclusion is inevitable, and against the prayer of the petitioner.

Your committee would, therefore, recommend the adoption of the following resolution:

Resolved, That the prayer of Abraham Acker for a seat in this House, as a member from Cortland county, in place of George J. J. Barber, ought not to be granted; but inasmuch as it is evident to the

committee that the claim originated, and has been pressed from an honest persuasion, on the part of Mr. Acker, therefore, that he be allowed the traveling and *per diem* pay of members up to this day.

All of which is respectfully submitted.

Assembly Documents, 1845, Vol. 1, No. 21.

GEORGE J. J. BARBER AWARDED SEAT.

Mr. Speaker stated the question to be on agreeing to the said report and resolution.

DIVISION OF THE QUESTION.

Mr. Betts called for a division of the question on the said resolution.

Mr. Speaker put the question whether the House would agree to the first part of the said resolution, and it was determined in the affirmative.

Travel fee and *per diem* allowed Abraham Acker.

Mr. Speaker then put the question whether the House would agree to the second part of the said resolution, and it was determined in the affirmative.

Assembly Journal, 1845, pages 127 and 128.

Case of John H. Dayton.

SEAT NOT FORFEITED BY ACCEPTANCE OF FEDERAL OFFICE —

FIRST DISTRICT, SUFFOLK COUNTY.

(Communication from John H. Dayton.)

IN ASSEMBLY, *January 13, 1845.*

Mr. Speaker presented a communication from John H. Dayton, which was read in the words following, to wit:

SAG HARBOR, *January 6, 1845.*

To the Speaker of the Assembly:

SIR.—The Constitution of our State declares that any member of the Legislature, by accepting an appointment, civil, diplomatic, etc.,

from the general government, thereby vacates his seat, or rather this is the gist of the section.

Now, sir, anxious that the good people of Suffolk county should be fully represented, and the situation of my family being such as by their indisposition to forbid my personal appearance at Albany to present my case before the House for its decision, I am induced to ask the favor of you, that if that decision should be to deny my right to a seat in your honorable body, the earliest possible opportunity may be afforded them, if they wish to supply the vacancy.

On the twenty-seventh of November, 1844, I received and accepted the appointment of the collector of customs for the district of Sag Harbor. Since that time, I have consulted several legal gentlemen, with a view to ascertain whether the prohibition extended to my case or not, having received the appointment previous to the opening of the session. Their opinions have not given me much light. Had I consulted only my own feelings, I should have resigned; but being unwilling to involve the county in the expense incident to a special election, I finally determined to bring the question personally before the House. The circumstances before mentioned preventing this, and deeming the House the proper and constitutional judges of the matter, must form my apology for asking through you their decision.

Respectfully yours,

JOHN H. DAYTON.

Ordered, That said communication be referred to the committee on privileges and elections.

Assembly Journal, 1845, pages 80 and 81.

Minority of committee report that acceptance of Federal office disqualifies.

IN ASSEMBLY, *January 14, 1845.*

Mr. Niven, from the committee on privileges and elections, to which was referred the communication of Mr. John H. Dayton, relative to his right to a seat in this House as a member of Assembly for Suffolk county, makes the following report of minority:

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IN ASSEMBLY, *January 14, 1845.*REPORT OF THE COMMITTEE ON PRIVILEGES AND ELECTIONS, ON
THE CASE OF J. H. DAYTON OF SUFFOLK.

Mr. Niven, from the committee on privileges and elections, to whom was referred the communication of John H. Dayton, a member elect, from Suffolk county, in reference to his ineligibility to a seat in this House, reports that the said John H. Dayton was elected a member of the Assembly for Suffolk county, at the last annual election, as appears from the return of the county canvassers filed in the office of the Secretary of State.

That on the twenty-seventh of November last, as he asserts, he received and accepted the appointment of collector of the customs for the district of Sag Harbor, an office conferred by the federal government.

The Constitution of this State, article 1st, section 11th, provides, that "if any person shall, while a member of the Legislature, be appointed to any office, civil or military, under the government of the United States, his acceptance thereof, shall vacate his seat in the Legislature."

The only question, therefore, that arises, is, whether Mr. Dayton is to be considered a member of the Legislature, previous to the time fixed by law for its meeting, and without having taken the constitutional oath. On this point, your committee have no hesitation or doubt. He had been duly elected; the fact of his election had been legally communicated by the county canvassers to the Secretary of State. And we infer that he was, at the time of his acceptance of the office of collector of customs, *de facto*, a member of this House; and by his acceptance of said office, he disqualified himself.

Your committee, therefore, recommend that his name be stricken from the roll of the House.

COMMUNICATIONS.

SAG HARBOR, *January 6, 1845.*

SIR.—The Constitution of our State declares that any member of the Legislature, by accepting an appointment, civic, diplomatic, etc.,

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from the general government, thereby vacates his seat; or rather, this is the gist of the section. Now, sir, anxious that the good people of Suffolk county should be fully represented, and the situation of my family being such as, by their indisposition, to forbid my personal appearance at Albany, to present my case before the House, for its decision, I am induced to ask the favor of you, that, if that decision should be to deny my right to a seat in your honorable body, the earliest possible opportunity may be afforded them, if they wish to supply the vacancy.

On the twenty-seventh of November, 1844, I received and accepted the appointment of collector of the customs, for the district of Sag Harbor. Since that time, I have consulted several legal gentlemen, with a view to ascertain whether the prohibition extended to my case or not, having received the appointment previous to the time of the opening of the session. Their opinions have not given me much light. Had I consulted only my own feelings, I should have resigned; but being unwilling to involve the county in the expense incident to a special election, finally determined to bring the question personally before the House. The circumstance before mentioned preventing this, and deeming the House the proper and constitutional judge of the matter, must form my apology for asking through you their decision.

Respectfully yours,

JOHN H. DAYTON.

To the Speaker of the Assembly.

On motion of Mr. Lee,

Ordered, That the said report be committed to committee of the whole House.

Assembly Journal, 1845, pages 87 and 88.

COMMITTEE OF THE WHOLE.

IN ASSEMBLY, *January 14, 1845.*

The House then resolved itself into a committee of the whole, on the report of the committee on privileges and elections, on the com-

munication of John H. Dayton, relative to his right to a seat in this House as member of Assembly for Suffolk county; and, after some time spent therein, Mr. Speaker resumed the chair, and Mr. I. Lee, from the said committee, reported progress, and asked for and obtained leave to sit again.

Assembly Journal, 1845, page 91.

IN ASSEMBLY, *January 15, 1845.*

Report of committee referred to committee on the judiciary.

Mr. Bailey moved to refer the report of the committee on privileges and elections, relative to the seat of John H. Dayton, to the committee on the judiciary.

Mr. Speaker put the question whether the House would agree to the said motion, and it was determined in the affirmative.

Assembly Journal, 1845, page 98.

MAJORITY REPORT OF JUDICIARY COMMITTEE THAT SEAT IS NOT
VACATED.

IN ASSEMBLY, *January 20, 1845.*

Mr. T. R. Lee, from the committee on the judiciary, reported as follows:

IN ASSEMBLY, *January 20, 1845.*

REPORT OF THE MAJORITY OF THE JUDICIARY COMMITTEE, ON
THE CASE OF JOHN H. DAYTON.

Mr. T. R. Lee, from the majority of the committee on the judiciary, to whom were referred the report of the committee on privileges and elections, upon the communication of John H. Dayton, in reference to his right to a seat as a member of Assembly from the county of Suffolk, reports that they have considered the matter referred to them, and present the following as the result of their investigation:

The question is whether the acceptance by Mr. Dayton, of the office of collector of customs at Sag Harbor, between the time of his election in November last and the beginning of the political year, disqualified him for a seat in this body. It arises under the 11th

section of the first article of the Constitution of the State, to which the House is now, for the first time, to give a construction, not legislative, but judicial, upon a case which has already occurred affecting the rights as well of the county of Suffolk, as of their representative, Mr. Dayton.

The section alluded to is in these words: "No person being a member of Congress or holding any judicial or military office under the United States, shall hold a seat in the Legislature. And if any person shall, while a member of the Legislature, be elected to Congress, or appointed to any office, civil or military, under the government of the United States, his acceptance thereof shall vacate his seat." It would be difficult to find terms more direct and perspicuous. The only point seems to be, was Mr. Dayton a "*Member of the Legislature*;" had he a "*seat*" there when he accepted office under the federal government? What, then, constitutes a member of the Legislature? When may he be said to have a seat?

According to the various provisions of this first article of the Constitution, members of the Legislature, as well as the Governor and Lieutenant-Governor, are to be elected in November or October, and "enter on the duties of their respective offices" on the first day of the political year; that is, on the first day of January next following their election. And members of Assembly held their seats for the term of one year. Thus the House elected in November, 1843, held from the first of January, 1844, till the first of January, 1845; that chosen at the last November election, holds from the first of January, 1845, to the first of January, 1846. Each successive House occupying one full year.

It follows then that prior to the first of January instant, no person elected to the present Assembly, was a "member of the Legislature," nor could Mr. Dayton "vacate his seat" to which he was not then entitled; else we must adopt the solecism, a public officer without an office, or admit this absurdity, that there were two co-existing Assemblies at one and the same time. Such appears to be the necessary result, from the language of the Constitution, according to its common acceptance.

Where the terms of a law are free from ambiguity, it is an acknowledged rule of interpretation that the meaning of the lawgiver must be sought for in the law itself. This principle applies with peculiar force to constitutional provisions, drawn as we may fairly presume them to be, with great care and deliberation. We are, therefore, in the opinion of your committee, not at liberty to warp the plain import of the provision in question, in order to meet any supposed object of its framers, beyond what appears upon the face of the instrument.

There does not, however, appear in the view of your committee, to be any conflict between the construction they have adopted and the context with which the passage stands allied, or the history of that part of the Constitution

On the contrary, it is shown by the strongest implication from the first clause of the eleventh section, that the convention did not mean to exclude United States officers, other than those holding judiciary or military stations, from seats in the Legislature; and the cognate provision prohibiting members of the Legislature from receiving appointments from the State government, covers just the same term which is insisted upon by your committee — that is the term during which such members should be entitled to sit, only varying the phraseology in order to prevent an evasion of the restraint, by a resignation before the end of the period for which they were elected.

If we look to the proceedings of the convention that framed the Constitution, we find that a provision was reported by a committee of that body, exactly meeting the views of those who would exclude officers under the federal government from a seat in this body — the rejection of which is regarded by your committee as a strong confirmation of their interpretation. Your committee respectfully offer the following resolution:

Resolved, That the seat of John H. Dayton is not vacated by his acceptance of the office of collector of customs at Sag Harbor.

Assembly Documents, 1845, Vol. 1, No. 19.

MINORITY REPORT OF JUDICIARY COMMITTEE THAT SEAT IS
VACATED.

Mr. Wheeler, from the minority of the committee on the judiciary, reports as follows:

IN ASSEMBLY, *January 20, 1845.*

REPORT OF THE MINORITY OF THE COMMITTEE ON THE JUDICIARY,
ON THE CASE OF JOHN H. DAYTON.

The undersigned, a minority of the committee on the judiciary, to whom was referred the report of the standing committee on privileges and elections, in the case of John H. Dayton, of Suffolk county, and the communication of said Dayton to the honorable the Speaker of this House, begs leave respectfully to report, that he has given the subject all the attention in his power, and entertains views on the subject differing from those of the majority of the committee, and that he deems it his duty to briefly state to the House his opinions, the question being a new one, and in the opinion of the undersigned a very important one.

There is not, and cannot be, any difference of opinion in relation to the facts in the case, for there is but one statement, and that is admitted to be true.

The difficulty arises from the application of the Constitution and laws to those facts. This is always more or less difficult, and good and honest men not infrequently differ in the application of legal principles, and therefore the undersigned feels that he is not transcending the powers delegated to him, or subjecting himself to the charge of improper motives in dissenting from the opinion of a majority of the committee of which he has the honor to belong.

A brief recapitulation of the facts will make the application of the law more apparent; and they are substantially as follows, namely: John H. Dayton, a member of the Assembly, from Suffolk county, after his election to this House, and before the first Tuesday of January, 1845, was appointed to, and accepted the office of collector of the customs for the district of Sag Harbor, by the United States government.

In the formation of our general and State government, our fathers marked out a new path in the history of nations; and the manner in which it was done, finally ratified or subsequently modified, was by propositions forming together a Constitution for the nation. The several States in a similar manner, by appropriate and not inconsistent propositions, formed the Constitutions for each separate, independent and sovereign State, each and all freed from any reasoning, void of all precedents, and each are alike independent on itself, the history of its own formation, and the good common sense of the people, for interpretation, where doubts of their meaning arise.

The rules of interpretation apply with equal force to the national and State Constitutions; and gifted men of this country have already given such rules to the nation, I might say, to the civilized world, which not only make doubtful passages clear in our own charts of liberty, but shed such a lustre upon the rights of man, as to produce an homage to American learning and genius.

Mr. Justice Story, in his learned and able work on the Constitution of the nited States, remarks, "that in constructing the Constitution of the United Staes, we are, in he firs instance, to consider what are its *nature* and *objects*, its *scope* and *design*, as apparent from the structure of the instrument viewed as a whole, and also viewed in its component parts.

"Where the words are unambiguous, but the provision may cover more or less ground according to the intention, which is yet subject to conjecture; or where it may include in its general terms more or less than might seem dictated by the general design, as that may be gathered from other parts of the instrument, there is much more room for controversy; and the argument from inconvenience will probably have different influences upon different minds. * * * Whenever it is a question of power, it should be approached with infinite *caution*, and *affirmed only* upon the most persuasive reasons.

"Contemporary construction is properly resorted to, to illustrate

and confirm the text, to explain a doubtful phrase, or to expound an obscure clause. It is to be constructed as a *frame* or fundamental law of government, established by the PEOPLE of the United States, according to their *own free pleasure and sovereign will*. In this respect," says the same author, "it is in no wise distinguishable from the Constitutions of the State governments. Each of *them* is established by the people for their own purposes, and each is founded on *their* supreme authority.

"The powers which are confirmed, the restrictions which are imposed, the authorities which are exercised, the organization and distribution thereof, which are provided, are in each case for the same object, the common benefit of the *governed*, and not for the *profit* or *dignity* of the *rulers*.

"The rule," says the same author, "of interpretation must be taken, which best follows out the apparent intention. This is the mode universally adopted in construing the *State Constitutions*. It has its origin in common sense.

"No construction of a given power is to be allowed, which plainly defeats or impairs its avowed objects."

Chief Justice Marshall is no less wise than the great man I have so largely quoted from, for he says as men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. If, from the imperfection of human language, there should be serious doubts respecting the extent of any given powers, it is a well settled rule that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. With these safe rules and following the earnest language of Mr. Jefferson, let the case of Mr. Dayton be tried. "I have always," says Mr. Jefferson, "thought that where the line of demarcation between the powers of the general and State gov-

eruments was doubtfully or indistinctly drawn, it would be *prudent* and *praiseworthy*, in both parties, *never* to *approach* it but under *the most urgent* necessity.

The object evidently designed by the framers of our Constitution was the preservation of our State Legislature from the direct or indirect influence of the national government, and the question which now presents itself is, does the eleventh section of article first, of our Constitution attain it by a construction which Story and Marshall authorize?

The section declares, that no person being a member of Congress, or holding any judicial or military office under the United States, shall hold a seat in the Legislature; and if any person shall, while a member of the Legislature, be elected to Congress, or appointed to any office, civil or military, under the government of the United States, his acceptance thereof shall vacate his seat.

The first questions which present themselves, are, is John H. Dayton of Suffolk county a member of the House, and if so, when did he become a member?

The certificate of the clerk of the county of Suffolk, directed to the Secretary of State, upon its face entitled him to a seat in this House, on the first Tuesday of January, 1845, *after* his taking the oath prescribed by law.

The time *when* he became a member of the Assembly must be gathered from the statute and not from general reasoning, because the membership is merely a thing of the statute.

General elections, says the statute, shall be held on the first Monday of November in every year.

Senators, and *members* of Assembly, are chosen by the people. Every member of the Legislature shall be privileged from arrest, etc.

Each *member* shall enjoy the *like privilege*, for the space of fourteen days previous to any such session, etc., etc.

The Legislature shall assemble at the Capitol in the city of Albany, on the first Tuesday of January, in every year. Each *member* of the Senate and *Assembly* shall be entitled, etc., for every

twenty miles of the distance from the place of his residence, to the place of the meeting of this House. If any *member* of the Senate or *Assembly* shall, after his arrival at the place of meeting of either House, *or on his way thereto*, be prevented by indisposition from attending either of the said Houses, he shall be entitled to the like compensation, etc.

Similar language is used in the Constitution —“Members of the Legislature, and all officers, &c., &c., shall BEFORE they enter upon the duties of their respective offices, take and subscribe the following oath or affirmation.”

It will strike the mind of even the most inexperienced in legal subtleties, that the language above quoted regards the election to this body, as constituting *membership*, but that the duties incident to the office cannot be assumed or performed until a particular time, and upon certain contingencies, that of taking and subscribing a particular oath or affirmation.

The language *member elect* or member of Assembly after the first Tuesday of January, is not in the Constitution or laws, and the term member of Assembly was used in the statutes prior to 1821, in the same manner as it is now used in the statutes and Constitution.

This language, and the manner of its use is perfectly simple and plain, and relieves the Constitution from an apparent want of clearness, and consequently, if this view of the Constitution and statutes is correct, the question ceases to be a doubtful one, even under the view taken of it by the majority of the committee. Besides, it casts no reflection upon the good and great men who constituted the convention for forming our Constitution, while the other view *implies* that they unguardedly or unskillfully performed their duty, either of which cannot be indulged for a moment.

Indeed the history of that convention shows that this very section was the occasion of much debate, and the amendments proposed to it as originally offered, and the one now existing adopted by a large vote with an evident understanding of its meaning.

The view taken upon this subject by the undersigned is sustained by the practice in the House of Commons in England, for persons elected to the House of Commons become at one time members for certain purposes, and at another time for other purposes, the former instantly upon their being returned elected, and *may be chosen members of committees before they appear and qualify*; and it is familiar to every one, that persons elected to our national Congress are entitled to certain privileges before sitting. In neither case, however, do such members become *acting* members until after they qualify, and yet for certain purposes they are as truly members before qualifying as after.

This reasoning, however, may fail, and be regarded as emphatically special, and if it it, then the broad question arises, what did men who framed our Constitution mean by the disability in the eleventh section of article first. The intent, the design, is what we want; if that intent or design is clearly stated, or even shadowed forth according to the opinions of constitutional law entertained and promulgated by Marshall and Story. The evil to be guarded against is the interference of the general government with the State sovereignty, and if, in the language of Mr. Jefferson, the line of demarcation is doubtfully or indistinctly drawn between the general and State governments, it would be prudent and praiseworthy in both parties *never* to approach it, *but under the most urgent necessity*.

Does this necessity now exist? Are the rights of Suffolk county in jeopardy? She has one able representative in this body, and upon this House declaring the seat of Mr. Dayton vacant, she may elect another member of Assembly; and besides, the whole House is bound to protect the rights of all the inhabitants of the State, and it will not be wanting in good faith to "chivalrous Suffolk."

No one can read this section and doubt that the convention intended to guard the State against national interference. Any other conclusion would be worse than folly; and that intent has been admitted in debate in this House, by those giving to the section a

different and only a limited construction, but it is said that intent is only to apply after the member shall have taken his seat. An illustration will show the unsoundness, if not the absurdity, of such an opinion better than argument.

A member of the Assembly (taking the language of the statute), from New York, is appointed collector of the port of New York on the last day of December, accepts his appointment, and takes his seat in this House on the first Tuesday of January. A member of the Assembly from Erie county is elected at the same time, in the same manner, takes his seat on the first Tuesday of January also, and is appointed collector of the port of Buffalo on the eighth of January, and accepts the appointment. On the tenth of January, the member from New York rises in his place and asks the House, by resolution, or otherwise, to declare the seat of the member from Erie county vacant, on the ground that he has accepted the office of collector *while* a member of this House. The House must sustain the resolution and declare the seat vacant, and yet, according to the view of the subject taken by the majority of the committee, the House cannot declare the seat of the collector of New York vacant; and yet the object of the framers of the Constitution was to prevent the national government from interfering, through national offices, with our State legislation. Can this be the result of the wisdom of the convention of this State, solemnly convened to form a Constitution in 1821? If this is so, every member of any future Legislature of this State, after his election, may be appointed to any civil or military office under the government of the United States, and hold them all. With such a construction what is the sovereignty of this great State? What is its independence, when nothing but a great moral personal consideration prevents the United States from making every member of our State Legislature a civil or military commander.

The absurdity and danger of such a construction strikes awe into every man's mind. It cannot do otherwise.

If more need be said, let the members of that convention speak, and tell us if possible what *they* meant.

Says Co. Young, then of Saratoga: "It would be well enough to say that the acceptance of an office under the general government should vacate the seat of a member *elected before* he received such appointment, but if the people chose *afterwards*, to confer their votes on a person holding such office, he could not conceive why they should not have the privilege of doing so."

Mr. Kings, of Queens, say: "We are members of both governments. The question before the convention is, whether, as these governments are independent in themselves, as far as relates to the appointments to office, and as we are now called upon to make a general law for this State alone, *it will not be wise in us to preserve that distinction, which the independent nature of our government naturally suggests!* Is it not important, in order to preserve the independence of the two, that their offices be kept distinct? The gentlemen of this convention, when they take into consideration the manifest importance of sustaining our *independence in our own* government, as well as in that of the federal union, will not doubt the correctness of this position. Many of the offices under the general government are of an important nature; and a man intrusted with the discharge of such important offices, ought not to burthen himself with the discharge of such important duties under the State government. In attempting to serve the two, one or the other will be neglected. The period has arrived in which some such rule ought to be laid down on this subject.

Mr. Bacon, of Oneida, says: "Could any man be blind to the enormous increase of patronage and influence which, in the course of events, and in the short period of thirty years, the national government had acquired to itself, to an amount which would once have startled even its warmest admirers. By means of its military, its naval and civil departments, it had spread itself over the whole surface of the country. Against whatever State party it was thrown in, that party must kick the beam. In looking over the several State Constitutions," says Mr. Bacon, "it will be found that at least thirteen out of twenty-four States have this provision in its full

extent. Can it be, then, uncourteous for New York to assert the *same* principle?"

Mr. Sutherland of Schoharie, who introduced an amendment of the section as reported by the committee, and which made the section as it now is, says, the amendment which I have offered *guards* against what I consider the only danger to which we can be exposed, by permitting the officers of the general government to hold seats in our Legislature. The amendment on your table, therefore, provides that any member of the Legislature who accepts any office from the United States, shall forfeit his seat. Here we have explicitly the intent of the framers of the instrument itself.

Still that word *while* is in the way it may be said. In the views already submitted that is of no consequence, but admit that it has a talismanic power to destroy and not preserve, according to the reasoning adopted by a strict construction, yet its malign power is destroyed by another consideration.

The moment the member takes his seat, that moment, so far as the Constitution is concerned, he is appointed to the office, accepts it, and his seat is thereby made vacant, because the Constitution only reaches the case where it comes within the bounds where offenses may come. A member of Assembly appointed to a United States office before he takes his seat, may perform his duties, receive its emoluments, and resign his seat in the Legislature before it commences, and then the constitutional disability does not reach him; it attaches only at the point where mischief can be done. It does not prevent men from taking office under the general government, but *if* offices are accepted it deprives them of State offices, and the wisdom of the law is as clear and apparent as the rays of the sun upon the dew drop.

In the opinion, therefore, of the undersigned, the seat of John H. Dayton, of Suffolk county, is vacant, and he begs leave to offer the following resolution:

Resolved, That the seat in this House of John H. Dayton, "a

member of Assembly" from Suffolk county, is vacant in consequence of his accepting the office of the collector of the customs for the district of Sag Harbor.

All of which is respectfully submitted.

D. E. WHEELER.

Assembly Documents, 1845, Vol. 1, No. 20.

Mr. Morrison moved to lay the said reports and resolutions on the table.

Mr. Speaker put the question whether the House would agree to the said motion of Mr. Morrison, and it was determined in the negative.

COMMITTED TO COMMITTEE OF THE WHOLE.

Mr. Worden moved that the said reports and resolutions be committed to a committee of the whole, and made the special order for to-morrow at twelve o'clock.

Mr. Speaker put the question whether the House would agree to the said motion of Mr. Worden, and it was determined in the affirmative.

Assembly Journal, 1845, pages 120, 121.

SEAT IS NOT VACATED BY ACCEPTANCE OF FEDERAL OFFICE.

IN ASSEMBLY, *January 23, 1845.*

The House again resolved itself into a committee of the whole, on the reports and resolutions of the majority and minority of the committee on the judiciary, relative to the right of John H. Dayton to a seat in this House, as a member of Assembly from the county of Suffolk; and after some time spent therein, Mr. Speaker resumed the chair, and Mr. Bailey, from the said committee, reported that the committee had had the said reports and resolutions under consideration, and had adopted the resolution reported by the majority of the committee on the judiciary, which said resolution is in the words following, to wit:

Resolved, That the seat of John H. Dayton is not vacated by his

acceptance of the office of Collector of Customs, at Sag Harbor, and that the chairman had directed their chairman to report the same to the House.

REPORT ADOPTED — SEAT NOT VACATED.

Mr. Speaker put the question, whether the House would agree with the committee of the whole in their said report, and it was determined in the affirmative.

Ayes 67. Nays 54.

Assembly Journal, 1845, pages 139, 140; see also pages 129 and 139.

JOHN H. DAYTON TAKES THE OATH OF OFFICE.

IN ASSEMBLY, *January 24, 1845.*

Mr. John H. Dayton, a member of the Assembly from the county of Suffolk, appeared in the Assembly Chamber.

Mr. Speaker administered to Mr. Dayton the oath of office prescribed by the Constitution; thereupon

Ordered, That Mr. Dayton do take his seat.

Assembly Journal, 1845, page 141.

Case of George T. Pierce and Epenetus Crosby.

DUTCHESS COUNTY — PETITION OF EPENETUS CROSBY PRESENTED.

IN ASSEMBLY, *January 7, 1896.*

The petition of Epenetus Crosby, for a seat in this House, as a representative from the county of Dutchess, was read and referred to the committee on privileges and elections.

Assembly Journal, 1846, page 67.

MAJORITY REPORT OF COMMITTEE AWARDS SEAT TO GEORGE T.
PIERCE.

IN ASSEMBLY, *January 28, 1846.*

Mr. Perkins, from the majority of the committee on privileges and elections, to which was referred the petition of Epenetus Crosby, praying for a seat in this House now occupied by George T. Pierce, reported in writing as follows:

IN ASSEMBLY, *January 28, 1846.*

REPORT OF THE COMMITTEE ON PRIVILEGES AND ELECTIONS, ON THE
PETITION OF EPENETUS CROSBY, PRAYING FOR THE SEAT IN THE
HOUSE OF ASSEMBLY NOW OCCUPIED BY GEORGE T. PIERCE.

The committee to whom was referred the petition of Epenetus Crosby, praying the seat in this House now occupied by George T. Pierce, report that they have had the same under consideration.

That the said Epenetus Crosby, and the said George T. Pierce, appeared before your committee, and the said Epenetus Crosby proposed and offered to prove to your committee, as follows:

1. That he was born and has resided in the county of Dutchess for the space of fifty-four years past, and for the space of twenty-one years has resided continuously and been engaged in the business of freighting and other mercantile business at Fishkill Landing, in election district No. 1, of the town of Fishkill, in said county.

2. That he has invariably transacted his business, drawn and indorsed notes, checks, and made out bills, and carried on all his correspondence in the name of "*E. Crosby.*"

3. That he has been extensively known in Dutchess county, and particularly in the town of Fishkill, for twenty years past, and almost universally by the name of "*E. Crosby*" or "Squire Crosby," and that when either of these names are mentioned, any person having resided in the town one year would know who was meant.

4. That there is no other person by the name of Epenetus Crosby in the county, and no other person whom the name "*E. Crosby*" would designate.

5. That the petitioner was nominated and elected to the Assembly in 1844, and had been one year before nominated for that office. That in 1845 he was the third time nominated some weeks before the election, and that it was well known to the electors he was a candidate, and there was no other person of the name of Crosby a candidate for any office at that election.

6. That four of the *five* votes for "*E. Crosby*," uncounted by the town inspectors and board of county canvassers, were given by Levi W. Turrell, Richard Stockholm, John I. Van Hagen and Elijah S. Parker, in election district No. 1, of the town of Fishkill, and the other of the said *five* votes was given by Reuben W. Nelson, in election district No. 1 of the town of Poughkeepsie, and that each of those persons would testify they cast said votes, intending them in good faith for your petitioner.

7. By Jeduthan Roe, one of the inspectors of election in the town of Northeast, that at the poll where he sat, two full State tickets, with the name of *Epenetus Crosby* for member of Assembly, among others, printed in full, were found in the State box, each containing folded within it a convention ballot. That neither of these were counted or canvassed by the inspectors, and that no decision was made as to their legality or illegality, but that both were attached as they were found to the statement, and returned to the board of county canvassers.

8. That the said statement, so returned, with these two said State tickets so attached, was before the board of county canvassers, and that the said State tickets were not counted or canvassed by them, because they contained convention tickets, and the statement was not sent back to the town inspectors.

9. That two votes, each having upon them four names for members of Assembly, were counted and canvassed improperly among others, to George T. Pierce, in the town of Amenia.

10. That there was one vote for "E. Crosby" in district No. 2 of the town of Fishkill not counted and justly belonging to your petitioner.

Your petitioner offers evidence establishing all these facts, taken in pursuance of statutory provisions, to your honorable committee.

The said George T. Pierce offered to prove to your committee as follows:

1st. That one vote was given for him in election district No. 2, in Fishkill, Dutchess county, mislaid by the town canvassers, and not counted to him.

2d. That one vote given for him in election district No. 2, in Poughkeepsie, Dutchess county, was illegally destroyed, without being counted to him.

3d. That one vote was counted and allowed to Epenetus Crosby which had four names on it, for the office of member of Assembly, the county of Dutchess being only entitled to three members of Assembly.

4th. That one vote given for E. P. Crosby was canvassed and allowed to Epenetus Crosby, and one to G. T. Pierce rejected.

5th. That several illegal votes were received for Epenetus Crosby, viz.: The votes of four negroes not having freehold estates and three votes of non-residents of the county of Dutchess.

6th. That there were other persons, residents in the county of Dutchess, to whom the name E. Crosby would apply, viz.: Edward Crosby and Ebenezer Crosby.

7th. That two other persons beside the four persons proposed to be produced by and on behalf of the said Epenetus Crosby, residents in district No. 1, in Fishkill, would prove they voted ballots for Assembly with E. Crosby written on them, and yet, only four ballots of that description are accounted for.

The counsel of Crosby, in reply to the last or seventh offer of Mr. Pierce, said that the persons alluded to by Mr. Pierce would testify they intended to vote for Epenetus Crosby.

Your committee, following the Assembly precedent, in the case

of Bovee against Sheldon, Assembly Documents of 1826, passed the following resolution:

On motion of Mr. Tefft, seconded by Mr. Harris,

Resolved, We will receive no evidence of any matter, back of the ballot-boxes, but will determine the question of the contested seat between Mr. Pierce and Mr. Crosby, upon the ballots which were actually cast, and will receive all evidence relative to the action of town and county canvassers in counting and canvassing the votes given.

Your committee, believing this the least expensive rule, equally likely to produce a just result, and a much more expeditious mode of disposing of the question between the parties, than to open the wide door for parol testimony, with its attendant evils, which has prevailed in Congress, and in the case in our Supreme Court, in the case of *Yates v. Furgerson*, 8th Cowen's Report.

The parties, under the preceding resolutions, have produced their proofs in relation to the votes given for them respectively, by which it appears that the county board of canvassers canvassed and allowed to George T. Pierce four thousand and eighty-nine (4,089) votes, and to Epenetus Crosby four thousand and eighty-eight votes, and to E. Crosby five votes and to G. T. Pierce one vote. There appears, by the testimony, to have been some two or three votes given to George T. Pierce, and the same number to Epenetus Crosby, not canvassed or counted by the town board of canvassers, for reasons assigned in the evidence. These votes not counted and returned to the county board of canvassers, might not, if allowed, vary the result, and the question as to the right to the seat as between the parties, has been decided by your committee on the votes given for E. Crosby.

A majority of your committee have resolved to recommend to the House the allowance of those votes to Epenetus Crosby for the following reasons:

In 1826, votes given for M. I. Bovee were allowed to Matthew I. Bovee by the Assembly, giving Bovee the seat on those votes over Alexander Sheldon, a sitting member.

The Congress of the United States decide questions of this description upon the intentions of the voters, taking parol evidence of the intentions of the voters casting the ballot.

The Supreme Court in the case of *Yates v. Furgerson*, sent the case to a jury to try as a question of fact, whether votes given for F. H. Yates were intended for Henry F. Yates.

The State canvassers, in cases where their decisions are subject to review by legislative assemblies, declare the election according to the correctly spelled ballots, with Christian names spelled at full length. But in canvassing the votes for presidential electors they adopt a different rule, viz.: the voter's intention, indicated by the ballot; and in 1836 allowed votes with the initial letters only of the Christian name as good votes for the candidate.

Town and county boards of canvassers are mere ministerial officers. The statutes confer on them no judicial discretion. They are required by law to declare the election according to the ballot or returns to them; they are clothed with no authority to take evidence or investigate intentions, or change the determinations of town boards of canvassers.

The county board of canvassers of Dutchess county, upon the returns of the town boards of canvassers, were bound to declare the election of George T. Pierce.

But by the Constitution the Assembly are made the judges of the election of their own members, exercising the functions of both judge and jury, and by the decisions and determinations above cited, your committee are of opinion it is the duty of this House to decide the matter between George T. Pierce and Epenetus Crosby upon the intention of the voters giving the votes for E. Crosby.

The facts appearing before your committee are, that George T. Pierce was one of the regular candidates of one of the great political parties of the State; that Epenetus Crosby was one of the regular candidates of the other political party. It is admitted that Epenetus Crosby is a resident of Fishkill, in Dutchess county, and often called E. Crosby, and that four of the votes given for E. Crosby

were given in Fishkill. It also appears, and is admitted, that there is resident in the county of Dutchess a citizen of the name of Edward Crosby, but that Edward Crosby does not reside in Fishkill.

Upon these facts a majority of your committee are of opinion that, judging upon circumstantial evidence as predicated on the ordinary actions of men at our elections, there can be no probable ground to doubt but that the votes given for E. Crosby were intended for Epenetus Crosby; and that said Crosby is entitled to the seat now occupied by Mr. Pierce. A majority of your committee, therefore, recommend the following resolutions:

Resolved, That George T. Pierce is not entitled to the seat as member of Assembly now occupied by him.

Resolved, That Epenetus Crosby is entitled to the seat as member of Assembly now occupied by George T. Pierce.

All of which is respectfully submitted.

BISHOP PERKINS.

L. I. TEFFT.

IRA HARRIS.

J. T. BUSH.

January 28, 1846.

Mr. Seacord dissents from this report.

See testimony and documents accompanying report, pages 9 to 46.
Assembly Documents, 1846, No. 45.

On motion of Mr. Seacord,

Ordered, That said report and resolutions be laid on the table.

Mr. Bailey moved that the said report, together with all the evidence upon the subject, and affidavits submitted to the committee on privileges and elections be printed.

Debates were had thereon, when, on motion of Mr. Chatfield,

Ordered, That the said motion be laid on the table.

IN ASSEMBLY, *January 29, 1846.*

MINORITY REPORT OF THE COMMITTEE ON PRIVILEGES AND ELECTIONS IN THE CASE OF CONTESTED SEAT BETWEEN GEORGE T. PIERCE AND EPIENETUS CROSBY.

Mr. Seacord, from the minority of the committee on privileges and elections, to whom was referred the petition of Epienetus Crosby, praying for a seat in this House now occupied by George T. Pierce, reported in writing as follows:

IN ASSEMBLY, *January 29, 1846.*

REPORT OF THE MINORITY OF THE COMMITTEE ON PRIVILEGES AND ELECTIONS ON THE PETITION OF EPIENETUS CROSBY FOR A SEAT IN THE HOUSE OF ASSEMBLY, NOW OCCUPIED BY GEO. T. PIERCE.

The undersigned, a minority of the committee on privileges and elections, is compelled to differ with a majority of said committee, in their report on the petition of Epienetus Crosby of the county of Dutchess, for a seat in this House now occupied by George T. Pierce.

It may be premised, that the principal question which the committee and the House have to determine, in this case, is, whether votes in which the initial letter only of the first name of the person claiming them is given, should be allowed to such person.

For although a large quantity of testimony has been taken with regard to other votes of various descriptions, canvassed and rejected, at the late election in the county of Dutchess, still the undersigned understands the majority of the committee to concede that the evidence in these several cases does not alter the complexion of the general case, but leaves Mr. Pierce with his majority of one vote, at least, with which the investigation was commenced. Even if the two votes from the town of Northeast should be allowed to Mr. Crosby, as it is claimed they ought to be, the undersigned is clearly of opinion that sitting member has offset these by one ballot shown to have been destroyed in district No. 3, of the town of

Poughkeepsie, and another in district No. 2, of the town of Fishkill; both of which contained his name among others, and ought to have been canvassed.

With regard to the two ballots in the town of Amenia, one of which had some indistinct letters written on its margin, and has been abandoned by the contestant in this case, and the other of which had the word "Wheeler" written on its margin without the erasure of any printed name, the undersigned cannot think that either of these ballots was thereby rendered defective. Because the word "Wheeler" was not such a name as the inspectors of election could canvass for any person, and, therefore, this was not such a case as it was the intention of the statute to provide against, when it declared that ballots having an excess of names for any office shall be destroyed.

With regard to the ballot in district No. 2, in the town of Fishkill, which the contestant in this case claims should be allowed to him on the testimony of Mr. Terry that it was given for E. Crosby, it is sufficient to say that Mr. Baxter, the inspector of election, through whose hands the ticket passed, swears that the name of Daniel Sherwood was erased and the word "Crosby," instead of E. Crosby written on the margin, a discrepancy between the two witnesses which must destroy the effect of their evidence. It seems to the undersigned, that the sitting member, Mr. Pierce, might insist with much more propriety on the vote in district No. 4, of the town of Fishkill, which the inspector of that district swears was written E. P. Crosby, the P. an old-fashioned one, larger than usual, and placed at some distance from the E., giving it the appearance of a middle letter. But whether this vote is relied on or not, the undersigned considers that the sitting member is thus far left with a clear majority in his favor and entitled to his seat.

This brings us back to the principal point at issue between the parties, viz.: whether, under any circumstances, and if so, what circumstances, votes in which only the initial letter of the first name of the person claiming them is given, should be allowed for such person and canvassed.

There are five such votes returned in the present case as given for E. Crosby and one for G. T. Pierce. The allowance of these votes by the House would give the contestant here his seat, while their rejection leave the case as it stands at present.

According to the act respecting elections, passed April, 1842, and the instructions of the Secretary of State under that act, no vote which is not written out in full in the Christian and surname, and also correctly, *at least* so as to sound like the name for which it is claimed, or which is not abbreviated by the well-known and universally-established abbreviations, is permitted to be canvassed, but must be returned as scattering, etc.

Now it would seem that the language of this act was too plain to be misunderstood. But against the words of the law is invoked the language of precedent. The undersigned understands the chairman of the committee distinctly to admit, "that if this was a new case, he would have no hesitation in adhering to the strict letter of the law, and the instructions of the Secretary of State under it." But is this not the first case under the act of 1842? Are we not about to establish the first precedent under that act? And is it not important that our decision (if it is to stand as a precedent to overshadow the law) should be such a one that it can lead to no evil consequences in future?

If the framers of the election law, and the Secretary of the State, intended that initial votes should be allowed for the candidate claiming them, why was it not said so? And why did they not establish some rule by which it should be determined who was entitled to them? Why did they adopt the rule of abbreviations instead of initials? Obviously because Wm., Jno., Hen., Abm., &c., the examples given in the instructions, could stand for no names but William, John, Henry, Abram, &c., and therefore amounted to absolute certainty. But they knew that W. does not always stand for William, nor J. for John, nor A. for Abram, nor E. for Epenetus, and therefore did not think it safe to substitute the latter for the former. They knew that the abbreviations given could not be

tortured into any thing else, while the meaning of simple initials could be perverted by prejudice, altered according to circumstances, or wielded by misconstruction.

But the answer to all this, is, it seems, that the law was made for town and county canvassers. But, was it not also made for the Legislature? Are we not bound by our own acts? Shall there be one law for the people and another and unwritten law, resting in discretion alone, for us? It seems to the undersigned, that the law is intended to apply to the whole community — to the Legislature, as well as to the town and county canvassers. It seems to the undersigned that it is the only safe law, and that if it is once disregarded there is no limit to the discretion of the Legislature or of the boards of canvassers.

If, as it is maintained, the intent of the voter is to govern, when not legally and fully expressed, instead of the law, where is to be the limit of the rule? If votes for E. Crosby may be allowed, why not votes for "Crosby" simply, without any Christian name? And if the latter, why may not the elector vote for one person and show an intent to vote for another? On this principle the undersigned was not at all surprised to hear the attorney for Mr. Crosby maintain, with regard to a certain ballot from the town of Amenias which had the word "Wheeler" written on the margin, without the erasure of any name, that it was obviously the intention of the elector in that case to vote for one Hiram Wheeler, and to erase one of the printed names, and he insisted that the name of George T. Pierce on said ballot ought not to have been allowed and canvassed.

But it is in vain, perhaps, to reason on this subject, as the undersigned understands the chairman of the committee to admit that the principle attempted to be established by the report of the majority is dangerous and wrong; but that the precedents are such that he is compelled to pursue the course recommended in his report. Now, the undersigned has little acquaintance with law or precedent, but it seems to him a strange case, which should be com-

pelled to eschew all reason and argument in the manner in which the majority of the committee have done, and rely alone on precedent. The majority have not attempted by argument to sustain a different construction of the law from the undersigned. And whether "the winding sheet of precedent" is to be suffered to enwrap a plain, simple and distinct provision of the statute till it becomes no longer the same provision that it was before, is to be seen.

To avail ourself of the language of another, after substituting the word *statute* for the word constitution, wherever the latter occurs, "we are told that like cases have occurred before, as though repetition could sanctify iniquity; as though a statute without ambiguity could be prostrated by precedent. It is fortunate for the State that public officers are not sworn to support legislative precedents, otherwise we should have an annual exhibition of the profligate legislation of 1836. * * * * Of what possible use are written statutes if their provisions can be canceled by legislative precedent? If the very tribunal which they are intended to restrain, can nullify their provisions by precedent, it is quite apparent that they are utterly useless."

But let us examine the precedents upon which the majority of the committee rely. And first, it is said that Congress is in the practice of inquiring into the intention of the voter, in cases similar to the present. Now this may be so, but the undersigned had thought that after the majority of the committee had refused to permit the sitting member to go into the proof of illegal votes, after the manner constantly pursued in Congress, that they would have been the last to adopt the practice of the body they had already condemned. Besides, the rule adopted in Congress had its origin in the different legislation of some of the States, and is accompanied by the practice of receiving the testimony of the voter himself, as to his intentions; a practice which the undersigned trusts will never be adopted in this State, and which the present case has shown so dangerous. Where, as in some of the southern States, the elector advances to the poll and names his candidate, and his preference is recorded, it may

do to allow him afterward to explain his vote. But for the adoption of such a rule in this State, where the elector casts a concealed ballot, the minority of the committee believes no one will contend.

The next case cited by the majority of the committee, is that of Bovee against Sheldon, at the session of the Legislature of 1826. The report of the committee in that case, as the House will perceive by a reference to it, was entirely against the allowance of initial votes under any circumstances. But when the report came before the House, the latter dissented from the results at which the committee had arrived, and declared Alexander Sheldon not entitled to his seat, by a majority of one vote out of one hundred or one hundred and fifteen. And it is proper to inquire on what grounds the House came to such a conclusion. Such an inquiry is material to the present case, and it may be answered by reference to the debates of that period.

When the report came before the House, the present Judge Vanderpoel moved that it be referred back to the committee, with instructions to make certain inquiries which had been ruled out when the parties were before it, and one of which was, whether there was any other man of the name of Bovee in the county of Montgomery whose Christian name begins with M. He contended that if there was no such person, Mr. Bovee ought to be considered by the House as the legal representative of the electors of the county.

The Speaker, Col. Young, said the applicant (Bovee), offered to prove before the committee, that there was no other person of his name in the county of Montgomery, and it was not pretended by the sitting members that there *was* a person of that name other than the applicant. Why then hesitate, etc.? The Speaker would put a case: Suppose on a ballot of the House for a committee, Alexander Sheldon should have ten votes, Elisha W. King eight votes, and E. W. King ninety votes. Could we hesitate as to who was meant by E. W. King? And why not? Because it is well known that there is but one member in the House of the name of King, the initials of whose name are E. W. So in the case under con-

Alexander Sheldon

sideration it was offered to be proved that there was *but one man in the county* of Montgomery of the name of Bovee whose initials were M. J.; consequently, those votes given for M. J. Bovee ought to be placed to the account of Matthias J. Bovee, the applicant for the seat.

Mr. Ogden Hoffman said that it appeared to be admitted on all sides that if there were two persons of the same name of the candidate voted for in the county, there was no criterion by which it could be determined which was the choice of the elector.

So again, with the case of Yates, cited by the majority of the committee, from the 8th of Cowen's Reports. In that case, the present chancellor of the State declined to receive evidence which went to the intent of the voter. But it was carried to the Supreme Court, and Judge Savage decided that the following "were facts which, if proven, would justify the jury in finding that these votes were intended and given for the relator, viz.: That the relator frequently subscribed his name H. F. Yates; that he had formerly been clerk, and then was a candidate for that office; that people would generally apply those letters to the relator, and that *no other person was known in the county to whom those initials were applicable.*" Thus it will be seen that even Judge Savage, with his latitudinarian principles on this subject, falls far short of the present case in his decision.

As to the course pursued by the State canvassers, the undersigned has always supposed that, in law, the last case overruled all prior cases of the same or inferior tribunals. He was, therefore, surprised to hear the majority of the committee, who rely exclusively on precedent, cite the canvass of 1836, which was completely overruled in the point material to the present case by the canvass of 1840, and near 1,000 votes returned as given for J. P. Phoenix rejected because they did not contain the full name. The undersigned does not refer to the latter case so much for a precedent as he does to show the necessity of a fixed and stable rule hereafter.

If we are to be governed by precedent, then, in the decision of

this case, the minority of the committee must beg leave to differ entirely with the majority in the conclusion to which they have come; since he finds now well settled and established precedent for the allowance of initial votes to those for whom they are claimed, unless it appears that there is no possibility of a misapplication, or unless there is no other person of the same initials in the election district to whom they could be applied. And all seem to enter even this circumscribed field with a reluctance indicative of the imminent danger to be apprehended from perversion or misconstruction. Would it be safe and proper, then, for this House to go still further, and allow these votes to the contestant in this case, when it is in proof, and admitted by the majority of the committee, that there is another E. Crosby in the county of Dutchess for whom they might have been cast and intended.

The committee decided that they would not go behind the ballot-box to inquire the intention of the voter, but would infer that intention from the ballots themselves. On these principles, the undersigned is unable to understand how the majority of the committee can arrive at any more correct conclusion on this subject than the House itself.

If there were no other E. Crosby in the county of Dutchess than Epenetus Crosby, the contestant in this case, there might be little difficulty or danger in inferring the intent of the voter. But is not the inference that these votes were intended for Epenetus Crosby, repelled, by showing more than one E. Crosby in the county? The undersigned thinks it is; and believes it would be dangerous for the committee or the House to make the selection between them.

The majority of the committee admit that there is an Edward Crosby in the county of Dutchess; but because the said Edward Crosby does not reside in the town of Fishkill (although he may have done so at some time before), but the said Epenetus Crosby does so reside, and has once before been a candidate, &c., therefore it is perfectly satisfactory to the majority of the committee, if the undersigned understand them, that the votes in question were in-

tended for Epenetus Crosby. Now the undersigned is not prepared to say, "on the evidence of any matter not behind the ballot-box," that these votes were intended for Epenetus Crosby any more than for Edward Crosby, or some other Crosby living in the same county to whom they would apply. And for this reason, he does not feel warranted in forcing a construction of the intent of the voter, and thereby depriving the latter of the right of throwing his vote for whom he chooses.

The majority of the committee state, "that judging from circumstantial evidence, as predicated on the ordinary actions of men at our elections, there can be no probable ground to doubt that the votes given for E. Crosby were intended for Epenetus Crosby." The undersigned would respectfully dissent from this conclusion, for it is no extraordinary case, and one which has frequently come under the observation of the undersigned, that the actions of men in voting are sometimes embarrassed by their dependence upon a candidate of opposite politics to themselves. In such a case, in order to comply with an implied obligation to vote for their patron, and at the same time not to prejudice their own principles, they cast an initial vote, well knowing that will not be allowed or canvassed, but returned as scattering. Whether it was so in the present case, the undersigned is unable to say. But it is enough for him that it *may* have been so; for he deems it his duty to keep on the safe side in the decision of the matter.

And inasmuch as we are about to settle the first case under the law of 1842, it is proper that our decision should be made on safe and correct principles, and established on such a basis as shall leave no doubt or embarrassment on those who shall be called to act upon it hereafter. Therefore it is that the undersigned has felt constrained to present to the House these considerations, and to insist that the votes returned for E. Crosby ought not to be allowed to the contestant in this case.

As to the other portions of the report of the majority, the undersigned generally concurs; and asks leave to introduce the following resolutions:

Resolved, That George T. Pierce is entitled to the seat now occupied by him in this House, as a representative of the county of Dutchess.

Resolved, That Epenetus Crosby is not entitled to a seat in this House as a representative from the county of Dutchess, and that the petitioner have leave to withdraw his petition.

All of which is respectfully submitted.

WILKINS SEACORD.

An affidavit, of which the following was the substance, has been mislaid or lost, and therefore does not appear among the evidence appended to the report of the majority of the committee:

AFFIDAVIT OF JOHN H. ROSS, OF DISTRICT NO. 1, OF THE TOWN
OF FISHKILL.

That he voted a ballot at the late election, in said district, with one of the printed names for member of Assembly erased, and the name of E. Crosby substituted therefor, and that he intended by the said E. Crosby any one that the board of inspectors should choose to apply it to. And further said deponent saith not.
Assembly Documents, 1846, No. 46.

On motion of Mr. Bailey,

Resolved, That the said report and resolutions be laid on the table, and that the same be printed.

On motion of Mr. Bailey,

The House then proceeded to the consideration of the motion, made by him yesterday, to wit: That the report of the majority of the committee on privileges and elections on the petition of Epenetus Crosby, together with all the evidence upon the subject, and affidavits submitted to the committee, be printed.

The Speaker put the question whether the House would agree to

the said motion of Mr. Bailey, and it was determined in the affirmative.

Assembly Journal, 1846, pages 230, 231.

COMMITTEE OF THE WHOLE — PIERCE-CROSBY CONTESTED SEAT.

IN ASSEMBLY, *February 9, 1846.*

On motion of Mr. Bailey,

Ordered, That the reports of the majority and minority of the committee on privileges and elections, together with the papers relating to the same, in the case of the contested seat in this House, on the part of Epenetus Crosby, be taken from the table and committed to a committee of the whole House.

On motion of Mr. Perkins the House then resolved itself into a committee of the whole on the resolutions reported by the majority of the committee on privileges and elections, on the petition of Epenetus Crosby praying for a seat in this House, now occupied by George T. Pierce, which said resolutions are in the words following, to wit:

Resolved, That George T. Pierce is not entitled to the seat as a member of Assembly, now occupied by him.

Resolved, That Epenetus Crosby is entitled to the seat as member of Assembly, now occupied by George T. Pierce, together with the resolutions reported by the minority of the said committee, which are in the words following, to wit:

Resolved, That George T. Pierce is entitled to the seat now occupied by him in this House, as a representative from the county of Dutchess.

Resolved, That Epenetus Crosby is not entitled to a seat in this House, as a representative from the county of Dutchess, and that the petitioner have leave to withdraw his petition.

And after some time spent thereon, Mr. Speaker resumed the chair and Mr. S. Lawrence from the said committee reported progress, and asked for and obtained leave to sit again.

Assembly Journal 1846, pages 321, 322.

IN ASSEMBLY, *February 10, 1846.*

COMMITTEE OF THE WHOLE.

On motion of Mr. Pierce, the House then again resolved itself into a committee of the whole on the resolutions reported by the majority and minority of the committee on privileges and elections, on the petition of Epenetus Crosby, praying for a seat in this House, now occupied by George T. Pierce; and after some time spent thereon, Mr. Speaker resumed the chair, and Mr. S. Lawrence, from said committee, reported progress, and asked for and obtained leave to sit again.

Assembly Journal, 1846, page 329.

IN ASSEMBLY, *February 12, 1846.*

On motion of Mr. J. R. Thompson, the House then again resolved itself into a committee of the whole on the resolutions reported by the majority and minority of the committee on privileges and elections on the petition of Epenetus Crosby, praying for a seat in this House, now occupied by George T. Pierce, and after some time spent thereon, Mr. Speaker resumed the chair, and Mr. S. Lawrence, from the said committee, reported that the committee had amended the resolution reported by the majority of the committee on privileges and elections so as to read as follows, to wit:

Resolved, That George T. Pierce is entitled to the seat as a member of Assembly now occupied by him, and that the committee had agreed to the said resolution, as amended, which he was directed to report to the House.

Mr. Speaker put the question whether the House would agree with the committee of the whole in their said report, and it was determined in the negative, as follows, to-wit:

Ayes, 58. Nays, 59.

Mr. Worden offered for the consideration of the House a resolution in the words following, to-wit:

Resolved, That Epenetus Crosby is entitled to the seat as a member of Assembly, now occupied by George T. Pierce.

Mr. Watson moved to amend the said resolution, by offering the following as a substitute therefor, to wit:

Resolved, That the question of the seat contested between George T. Pierce and Epenetus Crosby be referred back to the standing committee on privileges and elections, with instructions to hear evidence which may be offered by either candidate as to the legality of the votes polled for either of them, or any other question of fact involved, and to report the same to this House within twelve days.

Mr. Speaker then put the question whether the House would agree to the said resolution, and it was determined in the negative, as follows:

Ayes, 57. Nays, 59.

Mr. Speaker then put the question whether the House would agree to the resolution offered by Mr. Worden, and it was determined in the negative, as follows, to wit:

Ayes, 58. Nays, 59.

Assembly Journal, 1846, pages 344, 345, 346, 347.

IN ASSEMBLY, *February* 13, 1846.

Mr. Stevenson moved a reconsideration of the vote of yesterday on the question of agreeing with the report of the committee of the whole, in the case of the petition of Epenetus Crosby for a seat in this House.

Debates were had thereon.

Mr. Speaker put the question whether the House would agree to the said motion of Mr. Stevenson, and it was carried, as follows:

Ayes, 60. Nays, 53.

Assembly Journal, 357, 358.

IN ASSEMBLY, *February* 13, 1846.

By unanimous consent of Mr. Chatfield,

Resolved, That Epenetus Crosby, who has appeared before this House and contested the seat of Hon. George T. Pierce, be allowed the traveling and per diem pay of members of this House, up to this

day, and also the expenses incurred by him in taking testimony to sustain his claim to said seat, to be paid out of the contingent fund of this House.

Assembly Journal, 1846, page 368.

Case of James E. Beers and John R. Hayward.

FIRST DISTRICT, WESTCHESTER COUNTY.

IN ASSEMBLY, *January 7, 1847.*

PETITION PRESENTED.

By unanimous consent, Mr. Watson presented a petition from sundry citizens, praying that John R. Hayward be admitted to a seat in this House in place of James E. Beers, which was read and referred to the committee on privileges and elections.

Assembly Journal, vol. 1, 1847, page 31.

REPORT OF COMMITTEE.

IN ASSEMBLY, *January 16, 1847.*

Mr. Smith, from the committee on privileges and elections, to which was referred the petition of sundry citizens of the county of Westchester, asking that the seat occupied by James E. Beers in this House, be given to John R. Hayward, reported against the prayer of the petitioners, as follows:

REPORT OF THE COMMITTEE ON PRIVILEGES AND ELECTIONS ON THE PETITION OF THOMAS HOPPS AND OTHERS, PRAYING THAT JOHN R. HAYWARD, OF THE COUNTY OF WESTCHESTER, BE ADMITTED TO THE SEAT IN THE HOUSE OF ASSEMBLY NOW OCCUPIED BY JAMES E. BEERS.

Mr. T. Smith, from the committee to whom was referred the petition of Thomas Hopps and others, praying that John R. Hayward may be admitted to the seat in this House now occupied by James E. Beers, reports:

That they have had the same under consideration; that the said

James E. Beers appeared before your committee, and that the said John R. Hayward did not appear either as a petitioner in person or by counsel.

The only evidence offered before your committee, will be found in the papers and documents accompanying said petition. From these two questions appear to be raised in relation to the said election.

1st. It is insisted on the part of said petitioners, that Andrew Findley, who acted as chairman of the board of county canvassers and signed the certificate of election, giving to the said James E. Beers a seat upon the floor of this House, was neither a lawful member of said board, nor was he the lawful supervisor of the town of Westchester at the time said election was held, and at the time of making said official canvass, as he claimed and was declared to be by said board of county canvassers.

2d. That the certificate of the board of inspectors of the fourth election district in the town of Bedford was not signed by the said inspectors, and yet was allowed by the board of county canvassers. And that if the same had been rejected, the said John R. Hayward would have had a majority of the remaining votes cast.

The first question appears to grow wholly out of the act of the last Legislature of this State, passed May 13th, 1846, dividing the old town of Westchester into two towns, viz.: Westchester and Westfarms. That act provided for the holding of town meetings in each of said towns on the first Monday of June then next following.

It appears from the evidence, that no town meeting was held in either of said towns on the day specified in said act for holding the same, but it appears that on the 30th day of June of the same year, a town meeting was held in the new town of Westchester, at which one Israel H. Watson was declared to be elected supervisor of said new town of Westchester. That no town meeting was held and no organization had in the other part of the old town called Westfarms.

It further appears, that Andrew Findley (who resides in that portion of the town hereafter to be called Westfarms) was duly

elected supervisor of the old town of Westchester, at the annual town meeting held in said town on the 7th day of April, 1846, and was duly qualified and acted as such supervisor.

That no new election districts had been formed in either of said new towns, but that the election in said old town of Westchester was conducted in all respects as if the act creating said new towns had not been passed.

It further appears, that at the meeting of said board of county canvassers, the said Andrew Findley and Israel H. Watson, both appeared and claimed seats as members of said board, and that said board decided in favor of admitting said Andrew Findley, who was subsequently made chairman thereof and signed the certificate of said board of county canvassers as such chairman.

In view of all these facts and circumstances your committee are unanimously of opinion that the board of county canvassers decided correctly in admitting the said Andrew Findley to a seat in that board, as supervisor of the town of Westchester. That it is hardly necessary to inquire how far the proceedings of the town meeting held in that part of the old town of Westchester, which is to retain the old name, on the 30th of June, are valid; that inasmuch as neither of the new towns had organized in pursuance of the act creating them, at the time the last annual election was held, there was no other alternative left but to hold the said annual election in the old town without regard to said division, or to allow the electors to be deprived of their right of suffrage.

In relation to the second question, your committee are aware that the statute in relation to elections requires the certificate of the inspectors in each election district to be signed by them, and when not so signed, it is made the duty of the board of county canvassers to cause the same to be returned to said inspectors, to be corrected by them; but they regard this provision as directory, and inasmuch as there is no pretence but what that certificate of the inspectors of the fourth election district in the town of Bedford was correct, and contained a true statement of the votes cast in said district, your committee are of the opinion that said omission affords no good

ground for reversing the decision of said board of county canvassers, and your committee, therefore, unanimously, recommend the following resolution:

Resolved, That John R. Hayward is not entitled to the seat as member of Assembly, now occupied by James E. Beers, and that the petitioners have leave to withdraw their petition.

Resolved, That James E. Beers is entitled to the seat now occupied by him, as member of the Assembly from the county of Westchester.

All which is respectfully submitted.

THOMAS SMITH.

ROBERT D. WATSON.

N. RAPLEE.

ARDEN WOODRUFF.

A. S. UPHAM.

January 16, 1847.

Assembly Documents, 1847, vol. 1, No. 29.

REPORT ADOPTED — MR. BEERS RETAINS HIS SEAT.

Mr. Speaker put the question whether the House would agree to the said first resolution, and it was determined in the affirmative.

Mr. Speaker then put the question whether the House would agree to the said second resolution, and it was determined in the affirmative.

Assembly Journal, 1847, vol. 1, pages 101, 102.

Case of John De La Montanye and Isaac L. Hasbrouck.

ULSTER COUNTY — PETITION PRESENTED.

IN ASSEMBLY, *January 9, 1847.*

By unanimous consent, Mr. Soper presented the petition of Isaac L. Hasbrouck, praying to be allowed the seat in this House occupied by John De La Montanye, the member returned from the county of Ulster; which was read and referred to the committee on privileges and elections.

Assembly Journal, 1847, vol. 1, page 45.

MAJORITY REPORT IN FAVOR OF MONTANYE.

IN ASSEMBLY, *January 19, 1847.*

Mr. T. Smith, from the committee on privileges and elections, to which was referred the petition of Isaac L. Hasbrouck, of the county of Ulster, prayed to be admitted to the seat occupied by John D. L. Montanye in this House, reported that a majority of the committee were against the prayer of the petitioner, as follows:

REPORT OF THE COMMITTEE ON PRIVILEGES AND ELECTIONS ON
THE PETITION OF ISAAC L. HASBROUCK, PRAYING TO BE ADMITTED TO THE SEAT IN THE HOUSE OF ASSEMBLY, NOW OCCUPIED BY JOHN D' L' MONTANYE.

The committee to whom was referred the petition of Isaac L. Hasbrouck praying to be admitted to the seat in this House, now occupied by John D' L' Montanye, report: That they have had the same under consideration.

That the said Isaac L. Hasbrouck, and the said John D' L' Montanye appeared before your committee and agreed that the statement of the proceedings of the board of county canvassers of the county of Ulster as set forth in the protest of the minority of said board, accompanying the petition of said petitioner, and hereunto annexed marked A. is correct.

From that statement it appears that the whole number of votes allowed by said board to said John D' L' Montanye was four thousand two hundred and fifty-four, and the whole number allowed to said Isaac L. Hasbrouck, was four thousand two hundred and fifty-three, thereby electing the said Montanye by one majority.

It further appears that there was returned by the board of canvassers from district No. 1 of the town of New Paltz, one vote for J. D. L. Montanye, but the ballot was not returned.

Also from district No. 3 in the town of Marbletown one vote for John Montanye, two votes for John V. L. Montanye, and one vote for J. D. L. Montanye, but the ballots were not returned.

All of which votes were allowed to said John D' L' Montanye by said board in making up the whole number above specified.

It further appears, from said statement, that there was returned from district No. 1 of the town of Wawarsing two votes for John L. Hasbrouck, but the ballots were not returned, and one vote from district No. 1 in the town of Kingston for J. L. Hasbrouck and the ballot not returned.

That the said board allowed to said Isaac L. Hasbrouck the last named vote for I. L. Hasbrouck, but rejected the two votes for John L. Hasbrouck.

It was also admitted by said parties, or their counsel, before your committee, that there was no other family by the name of Montanye in the county of Ulster beside that of the sitting member except that of one Abraham Montanye.

It was also admitted that Hasbrouck was a very common name in said county, and it was asserted by the counsel of said John D' L' Montanye, but not admitted or proved, that there was a person by the name of John L. Hasbrouck residing in said county.

Your committee, after hearing the arguments of counsel and the admission of the parties as above set forth, on motion of Mr. Watson, adopted unanimously the following resolution.

Resolved, That we will receive no evidence of any matters back of the ballot-boxes, but will determine the matter in question of the contested seat between John D' L' Montanye and Isaac L. Hasbrouck upon the ballots which were actually cast, and will receive all evidence relative to the action of town and county canvassers in counting and canvassing the votes given.

There being no other proof offered by either party, your committee proceeded to decide said matter upon the above statement of facts.

It was contended on the part of the petitioner, first, that all the votes allowed to the parties by the board of county canvassers in which the names of the candidates were not written or printed at full length, and where the ballots were not returned, should have

been rejected as defective ballots upon the ground that the statute requires all such ballots to be returned by the town inspectors.

The language of the statute imposing this duty upon the inspectors is in these words, "They shall also attach to such paper the original ballots rejected by them as being defective." (1 R. S. page 141, § 42, 3d edition).

It may be somewhat of a question what constitutes defective ballots within the meaning of the statute, but a majority of your committee deem it unnecessary to discuss or decide that question in this case, inasmuch as all the ballots which the petitioner insists were *defective* were allowed to each candidate except the two for John L. Hasbrouck, and we are to presume that they did not reject those as being *defective*, but refused to allow them to the petitioner because they could not construe *John* to mean *Isaac*.

It is also insisted on the part of said petitioner that no ballots should have been allowed for either of the candidates under the provisions of the act of 1842 prescribing the form of the ballot except such as contained their names, written or printed, at full length, and his counsel refers to the printed forms and directions of the then Secretary of State, Col. Young, prepared under this statute as authority for such construction.

The language of that statute is as follows: "The ballot shall be a paper ticket, which shall contain, *written* or *printed*, or *partly written* or *partly printed*, the names of the persons for whom the elector intends to vote," &c.

With all due deference to the opinion of the late able and learned Secretary of State, a majority of your committee cannot come to the conclusion that it was the intention of the framers of that law that no votes should be thereafter allowed except such as contained the names of the candidates written or printed at full length. Such a course would be a departure from all former laws, and from the precedents which have almost invariably been established both in this State and the Congress of the United States upon this subject.

To warrant us in putting the construction contended for by the petitioner upon this statute, we must assume that J. D. L. Montanye and I. L. Hasbrouck are not *names*. Now, every day's experience convinces us that these are regarded as names. Many persons use only the initials of their Christian names in the transaction of all their business. The presidents and cashiers of banks, and the makers of bills of exchange and promissory notes in many instances, and in some cases invariably use the initials for the Christian name, and yet who ever heard it pretended that such signatures did not contain the names of the officers or makers. If the Legislature intended that the names should be written out or printed at full length upon the ballot, it appears to a majority of your committee that they would have said so in express terms; and in the absence of any such language your committee are inclined to give it the construction above indicated.

This brings your committee to the consideration of the second question raised by the counsel for the contestant, viz: That the Board of County Canvassers erred in allowing to said John D' L' Montanye the vote for John Montanye, the two votes for J. D. L. Montanye, and the two votes for John V. L. Montanye, for the reason that they do not sufficiently express the intention of the electors.

It is urged in support of this position, that D' L' Montanye is a French name, and that D. L. instead of being middle letters, are a part of the surname.

A majority of your committee can hardly justify themselves in making so *nice* a distinction as to say that the omission of the *apostrophe* after the letters D. and L., or in other words converting the name from French to English without changing a *letter*, should deprive the elector of his vote. Probably not one in a hundred, and perhaps not one in a thousand, on hearing the name of the candidate John D' L' Montanye, would in writing the name use the *apostrophe*.

In addition to this, a majority of your committee understood it to be admitted by the parties, that when the surname of the sitting member is mentioned in the county where he resides, he is generally called *Montanye*, and not D' L' Montanye, and that he usually goes by the name of *John Montanye*.

In relation to the objection of allowing the votes containing the initials of the Christian names of the parties, a majority of your committee consider that question as having been too long and well settled, both by judicial decisions and Legislative precedents, to admit of any reasonable doubt.

It is true, the decision of the last House of Assembly, denying a seat to Epenetus Crosby, in the place of George T. Pierce, may form an exception to this rule, but it must be borne in mind that that decision was made in opposition to a very able report of a committee, a majority of whom was composed of the political friends of the then sitting member, and if the majority of that House intended to base their decision upon the ground, that votes containing only the initial letters of the Christian names, should in no case be allowed, a majority of your committee believe the decision to have been wrong, and ought not to be followed as a precedent.

Among the numerous precedents to be found upon this point sustaining the opinion of a majority of your committee, they would refer to the case of Bovee, decided in this House in 1826, where votes given for M. J. Bovee, were allowed by a body claiming to be Democratic, to Matthias J. Bovee, giving him a seat over Alexander Sheldon, the sitting member.

The Supreme Court, in the case of *Yates v. Ferguson*, sent the question to a jury, to decide whether votes given for H. F. Yates, were not intended for Henry F. Yates, and the jury decided they were so intended. (See 8th Cowen Reports, 102.)

A majority of your committee are, therefore, of the opinion, that the board of county canvassers decided correctly, in allowing the two votes returned for J. D. L. Montanye, and the vote for I. L. Hasbrouck, to the respective candidates.

It is also insisted that the vote returned for John L. Montanye, and the two votes for John V. L. Montanye, should not have been allowed to him.

This seems to bring up the question, how the middle letter or letters in a name are to be regarded? In deciding this, we find the following principles established by our judicial tribunals: The law knows only one Christian name. (5th Johnson's Reports, 84, Franklin v. Talmadge.) In law, a middle letter in one's name is no part thereof. (1st Hill's Reports, 102, Miller v. Christian.) An initial letter between the Christian and surname of a person, is no part of the name, and the omission is not a *misnomer* or *variance*. (4 John. Rep., 119, note A.)

If these principles of law are correct, they not only establish the fact that the vote for John Montanye was properly allowed, but also the two votes for John V. L. Montanye, for if the middle letters are not to be regarded as part of the name, then omitting one or both of them could not vitiate the votes. But independent of the legal decisions upon this subject, it is not pretended that there is any other John Montanye, or any John V. L. Montanye, in the county of Ulster, to whom these votes could apply. A majority of your committee are of the opinion, that the using of the V, instead of D, rose entirely from the similarity of the sounds of the two letters, and led to the mistake in writing the letter V, instead of D, and that no impartial mind can avoid coming to the conclusion, that these *two votes*, as well as the *vote* for John Montanye, were all intended for John D' L' Montanye, the sitting member.

The two votes returned to John L. Hasbrouck and rejected by the board of county canvassers, involve an entirely different question. *John* Hasbrouck is *not*, and cannot be *turned* or *tortured* into *Isaac* Hasbrouck. The material name — the *Christian* name, is wrong, and the majority of your committee know of no law on precedent that would justify them in allowing the two last mentioned votes. It would be too great a stretch of the imagination to suppose that the elector in voting for *John* meant *Isaac*. There

may be many John Hasbroucks in the county, to whom that ballot might apply.

A majority of your committee, therefore, recommend the following resolutions:

Resolved, That Isaac L. Hasbrouck is not entitled to the seat as member of Assembly from the County of Ulster now occupied by John D. L. Montanye, and that the petitioner have leave to withdraw his petition.

Resolved, That John D' L' Montanye is entitled to the seat now occupied by him as member of Assembly.

All of which is respectfully submitted.

THOMAS SMITH.

ARDEN WOODRUFF.

A. S. UPHAM.

Messrs. Watson and Raplee dissent from this report.

(A.)

PROTEST.

The subscribers, members of the board of canvassers of the county of Ulster, *protest* against the decision of the majority of said board, whereby it was declared that John D' L' Montanye was elected one of the members of Assembly of this county, at the election held in this county on the third day of November instant.

The grounds of our protest are as follows:

The whole number of votes returned by the boards of canvassers in the different towns, were for Isaac L. Hasbrouck, four thousand two hundred and fifty-two (4,252).

For John D' L' Montanye, four thousand two hundred and forty-nine (4,249). Showing a majority for Isaac L. Hasbrouck, over the said John D' L' Montanye of *three votes*.

There was also returned by the board of canvassers, from district No. 1, of the town of New Paltz, one vote for J. D. L. Montanye, but the ballot was not returned.

Also, from district No. 3, of the town of Marbletown, one vote for John Montanye, two votes for John V. L. Montanye, and one vote for J. D. L. Montanye, but the ballots were not returned.

Also, from district No. 1, of the town of Wawarsing, two votes for John L. Hasbrouck, ballots not returned.

Also, from district No. 1, of the town of Kingston, one vote for J. L. Hasbrouck, ballot not returned.

Of these votes so returned, the board of county canvassers allowed to the said John D' L' Montanye, the vote for John Montanye, the two votes for John V. L. Montanye, and the two votes for J. D. L. Montanye; and this increased his vote to four thousand two hundred and fifty-four votes. They also allowed to said Isaac L. Hasbrouck, the vote for I. L. Hasbrouck, thus increasing his vote to four thousand two hundred and fifty-three votes; but rejected two votes for John L. Hasbrouck.

Admitting, for sake of argument, that the two votes for J. D. L. Montanye, and the one vote for I. L. Hasbrouck were correctly canvassed, notwithstanding they were not returned as defective ballots; yet the votes for John Montanye, and John V. L. Montanye, are, in our opinion, not legal votes for John D' L' Montanye, *because*, the surname of the said John D. L. Montanye is D'L'Montanye, and not Montanye; the Christian name is John, and not D. L. Therefore, these votes ought not to have been allowed by the board of county canvassers as given for the said John D'L'Montanye. And that if those votes had been rejected, the said Isaac L. Hasbrouck would have had a majority of two votes, and thus have been declared duly elected as a member of Assembly from the county of Ulster.

JOHN B. DAVIS, *Supervisor of Olive.*

JAMES RUSSEL, *Supervisor of Saugerties.*

REUBEN DEYO, *Lloyd.*

JOHN BLANSHAN, *Rosendale.*

MOSES SCHOONMAKER, *Rochester.*

JOHN D. CROOK, *Marlbrough.*

(B.)

PETITION TO THE HOUSE OF ASSEMBLY OF THE STATE OF NEW YORK.

The undersigned, Isaac L. Hasbrouck, of the county of Ulster, respectfully represents, that at the annual election, held in and for the said county of Ulster, on the third day of November, last past, he was duly and rightfully elected a member of the Assembly of this State, and ought, and should have been declared so to be elected by the board of county canvassers, and have received the certificate of election from said board of canvassers accordingly. The facts to sustain his claim and title to a seat in the present House of Assembly, are fully stated and set forth in the annexed protest of a minority of the said board of county canvassers, and is herewith presented. And the undersigned alleges, that notwithstanding he received a majority of all the votes cast at said election for member of Assembly, the certificate of election, was, in violation of his rights and contrary to the law of the land, delivered by the said board to John D' L' Montanye, who was by the said board, declared to be duly elected a member of Assembly for said county of Ulster. The undersigned, therefore, respectfully asks that he may be admitted to his seat in your honorable body, as a member from the county of Ulster, to which he conceives himself legally entitled.

Respectfully submitted.

ISAAC L. HASBROUCK.

Dated January 5th, 1847.

Assembly Documents, 1847, vol. 1, No. 16.

Ordered, That the said resolutions be laid on the table, and that said report be printed.

Assembly Journal, vol. 1, 1847, page 113.

MINORITY REPORT IN FAVOR OF MR. HASBROUCK.

Mr. Watson, from the minority of the committee on privileges and elections, to which was referred the petition of Isaac L. Has-

brouck, praying to be admitted to the seat now occupied by John D. L. Montanye, reported favorably to the prayer of the petitioner, as follows:

REPORT OF THE MINORITY OF THE COMMITTEE ON PRIVILEGES AND ELECTIONS, WITH REGARD TO THE CONTESTED ELECTION IN ULSTER COUNTY.

The undersigned, a minority of the standing committee on privileges and elections, to whom was referred the petition of Isaac L. Hasbrouck, praying to be admitted to the seat in the Assembly now occupied by John D' L' Montanye, respectfully submit the following report:

Mr. Hasbrouck was the regularly nominated and recognized candidate of one, and Mr. D' L' Montanye of the other of the two political parties into which the people are divided. Mr. Hasbrouck of the Democratic, and Mr. D' L' Montanye of the Whig party.

Mr. Hasbrouck, by his true full name, received four thousand two hundred and fifty-two votes. Mr. D' L' Montanye in like manner by his true full name received four thousand two hundred and forty-nine votes, leaving upon the canvass of these undisputed and unequivocal votes, a majority of three votes for Mr. Hasbrouck. This canvass rejecting the equivocal or defective votes, clearly entitled Mr. Hasbrouck to the certificate of election. The right of Mr. D' L' Montanye to the certificate, therefore depended, and still depends upon the allowance to him of a sufficient number of equivocal or such defective votes to overcome the three majority of regular votes for Mr. Hasbrouck. The number of such votes cast at the election was eight, viz.: For John V. L. Montanye two, for J. D. L. Montanye two, for John Montanye one, for I. L. Hasbrouck one, and for John L. Hasbrouck two. That these votes were cast appears in the statements contained in the certificates of canvass returned by the boards of district inspectors of election, but in neither case *was the ballot* containing the defective or doubtful name *returned* by the district inspectors to the board of county canvassers as the *statute requires*. These votes were considered

by the board of county canvassers erroneously. In considering them, the board allowed to Mr. D' L' Montanye the two votes given for John V. L. Montanye, the two given for J. D. L. Montanye, and the one given for John Montanye, thereby adding five to the number of his regular votes, and giving him a majority of two over the number of Mr. Hasbrouck's regular votes. The board rejected the two votes given for John L. Hasbrouck, but allowed Mr. Hasbrouck the one given for I. L. Hasbrouck, still leaving the number of his votes one below the number so allowed to Mr. D' L' Montanye. Basing their action upon this state of facts, the board of county canvassers awarded and delivered the certificate of election to Mr. D' L' Montanye.

The minority of your committee are of the opinion, that in so considering and allowing those irregular or defective votes, and in certifying their determination that Mr. D. L. Montanye was by such votes "duly elected," the board of county canvassers acted erroneously and without proper authority of law. The minority of your committee will presume to submit some considerations in support of their opinions.

The act entitled "an act respecting elections other than for militia and town officers," passed April 5th, 1842, prescribes the manner of conducting the general elections to be held in this State, and of canvassing the votes and certifying the results. It also declares who shall be district inspectors of election, and who shall be county canvassers, and prescribes with minute precision their respective powers and duties. The opinion expressed is founded upon a consideration of the facts presented, in connection with the provisions of the before mentioned act.

In the formation of this act, the Legislature in several of its provisions recognized the judicial character of several of the duties of the board of county canvassers in considering the votes and certifying their determination, and for the reason that their duties were judicial in their character, in the exercise of which they were to determine and declare the sovereign will of the people in the only

legal mode provided for its expression, the Legislature to avoid uncertainty, misapprehension or doubt, prescribed by the statute, the evidence, and *the only evidence* upon which the county canvassers should act:

First. The statute declares that the vote or "ballot shall be a paper ticket, which shall contain written, or printed, or partly written and partly printed, the *names* of the persons for whom the electors intend to vote." (Section 8, article 2, title 4, of the act.)

Second. The statute requires that the district inspectors "shall securely attach to a statement of such canvass (their canvass for the district) one ballot of each kind found to have been given for the officers to be chosen at such election, any or either of them, and they shall in words at full length immediately opposite such ballot, and written partly on such ballot, and partly on the paper to which it shall be attached, the whole number of all the ballots that were received which correspond with the one so attached, so that one of each kind of the ballots received at such election, shall be attached to such paper with a statement of such canvass." (Section 42, article 4, title 4 of said act.)

Third. The last clause of the same section, last cited, requires that "they (the district inspectors) shall also attach to such paper the original ballots rejected by them as being defective, which were given at such election."

Fourth. Section 44 of the same title and article last cited, prescribes what the statement of the district inspectors shall contain, and among other things requires that it shall contain "at the end thereof a certificate that such statement is correct in all respects."

Fifth. The last clause of the same section requires that the certificate shall be subscribed by the inspector.

Sixth. Section 48 of the same article and title, requires that "the original statement, duly certified, shall be delivered by the inspectors or by one of them, to be deputed for that purpose, to the supervisor of the town or ward within twenty-four hours after the same shall have been subscribed."

Seventh. That no district shall be deprived of its vote through defects or omissions shown by such statements. Section 15 of article 1, title 5, of the act makes it the duty of the board of county canvassers to send back a defective statement by one of their number deputed for that purpose, to the town canvassers, to have the same corrected, and to adjourn from day to day till his return, not exceeding three days.

This statement of the provisions and requirements of the statute shows not only that the Legislature prescribed and limited the kind of evidence which the board of county canvassers should receive and act upon, but it also exhibits the great caution and scrupulous care with which the statute was drawn. It should be regarded and administered by the boards of county canvassers with the like caution and care, unswayed by political desires or personal pique. It was unquestionably the object and design of the Legislature to make the statute so plain, and yet so stringent, as to furnish a full protection again the declaration of improper results, founded upon constructive votes, and induced by political preferences, partisan feelings, or personal animosities; and to secure, under all circumstances in which an election may be held — however active the political contest, or ardent the political excitement may be, the true and undoubted result of all the legal and proper votes deposited in the ballot-box, in a form to impose confidence and command obedience. The whole fabric of elective government rests upon an inflexible adherence to a faithful practice of this principle,

The ballot shall contain the name of the person for whom the elector shall intend to vote; so says the statute. The object was to procure from the elector himself the written or printed evidence of his intention; evidence to be presented to the eye of those whose rights or duty might require them to judge of and give construction to it; evidence unalterable, and by well established rules, unexplainable and not to be contradicted; evidence standing alone, its own and only guide to its application. If it shall contain the name of the person for whom the elector intended it, all well,

whether the person be or be not a regular candidate. If the elector, for his own reasons, shall inscribe his ballot with a name similar to, but not that of a candidate, it is his own business. If he shall unfortunately err in the name which he writes or prints on his ballot, it is his misfortune. In either case he must abide by it, and no one else has a right to complain. In neither case has the candidate a right to claim it, and say "that means me." If he should make the claim, ask him the question, "do you own the name?" He would not dare answer "yes," for that would admit that all other votes given, bearing his name, were wrong; such answer would be untrue, for the name would not be the name of his person. In short, if the ballot does not contain the name of the candidate it cannot be legally allowed to him. Now what is the proper meaning of the word "name," as used and intended in this statute under such a construction as it should receive in view of its objects and of the manifest care and caution with which it was made? Certainly nothing less than, or different from, the full designation of the individual as he would himself write it, distinguishing him from every other person. Such must be the construction of the word "name," as used in the statute; for it was the design of the statute to require a ballot which would thus unquestionably distinguish and designate the person for whom it should be given from all others.

Apply this construction to the case under consideration; suppose the sitting member should be asked for his full autograph, he would doubtless write it "John D' L' Montanye," for that is the name which he claims, and uses, and by which he is known and distinguished, and was voted for. His certificate of election contains that name, and he appears and takes his seat and oath of office under it. He acknowledges no initial V. in his name. He is too much of a Frenchman to be Dutch enough for that, notwithstanding he comes from the neighborhood of Esopus. How, then, can a ballot containing the name "John V. L. Montanye" be legally so altered or changed (not in fact, but by construction), as to read

"John D. L. Montanye?" It cannot be done, unless the letters V and D shall be transposed in their uses in the language, and periods and apostrophes shall be substituted for each other. Written language is not so flexible, V is not D, nor is it possible for it in its proper use as an initial, to indicate the same name; and the well established rules of written evidence forbids the transmutation performed by the board of county canvassers. The similarity or identity even of the remaining part of the name, cannot avoid or change the rule of evidence controlling it, nor can the fact that J. D. L. Montanye was a regular candidate avail against its application. The ballot must stand alone; it is the vote, the act of one man. The votes of others, no matter what the number may be, cannot aid in, or change the construction of it. There is no legal connection between them; my vote is not yours, nor yours mine; my vote cannot be construed by yours, nor yours by them all put together. The attempt to do it would be folly, and the effect, if successful (as in this case) might be falsehood. The like rule applies to the two ballots containing the name "J. D. L. Montanye." How did the board of county canvassers know that the "J." in each of those ballots stood for "John?" J. does not always stand for John. There are a score of names with that initial; suppose these ballots shown to a stranger, he would not have known whether the J. stood for James, or Joseph, or Jacob, or Joshua, or Jeremiah, or Jared, or Jethro, or Jedutham, or Jehosaphat, or John, or any other equally euphonious name beginning with J; nor whether the J. in each case meant the same name or person; nor could he have ascertained without parol evidence, obtained from the voter, or from some person who knew his intention. The members of the board of county canvassers, were, in the performance of their duty as such board, to look upon and judge of those ballots as strangers to all parties, personal and political. Had they done so, they would have had no evidence to guide them to the conclusion which they adopted, that the J. on each of these ballots meant *John*. The same rule applies to the vote given for I. L.

Hasbrouck; I. does not always indicate Isaac; one vote was given for "John Montanye," which was allowed to John D. L. Montanye, the sitting member. This vote was allowed to him at the expense of the proudest part of his cognomen, as well as in violation of the rules of written evidence before stated. Montanye, is no more the name of *D. L. Montanye*, than Buren is of *Van Buren* — than Connell is *O'Connell*, or Fayette is *La Fayette*, whose name by the way was *De La Fayette*, precisely the prefix abbreviated in the name of Mr. D. L. Montanye, a very common abbreviation in writing French names. The prefix *D'L'* is common to all the family bearing the name, which may be, and doubtless is, for the sake of brevity and ease of pronunciation among persons speaking exclusively the English language, frequently called "Montanye;" some from long neglect of its use in speaking, may have dropped it in writing the name, but not so with the sitting member, or his immediate connexions, as he admits.

If the minority of your committee are correct in the construction of the word "name," as used in the statute (and they submit that it is the only rule that will insure certainty and safety), then the board of county canvassers plainly erred in allowing to either candidate any of the imperfect votes mentioned. If, for the sake of obtaining votes, contractions and inferences could change *V* into *D* — make *J* beyond a doubt, mean John, and *I* mean Isaac, and render visible *D' L'* where they never were; then the same causes might, with the same reason and propriety, change John into Isaac, and allowed to the contestant the benefit of the two votes given for John L. Hasbrouck; that would have elected, as the regular votes did elect him, a member of the Assembly. The rule presented by the minority of your committee does not militate against the instructions of the Secretary of State, to allow votes given by well known abbreviations as Geo. for George, and Thos. for Thomas. Such votes apply as certainly to the individuals as if the name was fully written, and certainty is the object sought by the statute.

But supposing, for the sake of the argument, that the board of

county canvassers possessed the right and power to alter or extend by construction, the language or meaning of those imperfect votes, then the question arises, had the board the necessary evidence before them, to authorize them to consider those votes at all? or, in other words, had the board jurisdiction to take cognizance of them in the manner in which they were presented? Had they the evidence required by the statute under which they were acting, to show that any votes containing such names were in fact given? The minority of your committee are of the opinion that they had not. The statute requires that the defective ballots shall be attached to the original statements made and returned by the district inspectors. The object of that provision is clear, and is founded upon another well-established rule of evidence, that is, that *parol* evidence shall not be received or admitted, to prove the contents of any written or printed instrument, but that the instrument itself must be produced. The vote itself is the best, yea, the only proper evidence of its contents, and with that view of it the statute requires the vote to be returned for the inspection of the board of county canvassers. It may be said that the statement of the district inspectors is written evidence of the contents of the vote. That cannot properly be so, for it is against the requirement of the statute and the principle on which it is founded. Such statement is mere *parol* evidence, sufficient, it is true, to prove the fact that the vote was given, and its identity, when produced, facts properly provable by *parol*, but not of its contents. Those can only be shown by its production and exhibition. It is true that the district inspectors act under oath, but that does not change the rule establishing the *degree* of evidence required by the statute, however true their statement may be. A witness in court may swear with entire accuracy to the contents of a written instrument in his possession, and even give a literal copy, yet it would not be received, because the instrument itself containing a higher degree of evidence would be within reach. His evidence would be good to prove the existence of the paper, but not the contents of it, the cases are parallel. The same prin-

ciple is seen in the provision requiring one of each of several like votes given, to be attached to the statement of the district inspectors. In that case, the contents of all are seen by the contents of the vote returned. That there may be no error or change committed, part of the statement returned must be written upon the ballot attached.

That being done, the inspector's statement is evidence of the number of like votes given.

It was contended by the counsel for the sitting member, that the statute requiring the return of the ballot itself was merely directory, and that a non-compliance did not prohibit the board of county canvassers from considering the votes as described in the statements of the district inspectors.

What has already been said, shows that such a position cannot be correct; that it stands in direct opposition to the design and purpose of the statute, and beside, the statute is in terms mandatory, and the object of the mandate is to procure the best evidence, a sort of *subpoena duces tecum*, to bring the ballot, for a disobedience whereof, the district inspectors would be liable to an action on the case, at the suit of any party injured thereby.

A brief reference to several other provisions of the statute having reference to the same design, certainty, will show the fallacy of this position so assumed by the sitting member. Suppose no ballots at all should be attached to a statement of the district inspectors as required by the statute, could the board of county canvassers consider and canvass the votes according to the contents of it? Clearly they could not. Suppose such a statement should not contain the certificate that it was "correct in all respects," as required by the statute, could it be received, and the votes specified in it be allowed by the board of county canvassers? Clearly they could not. Again, suppose that such a statement should not be subscribed by the district inspectors, as required by the statute, could it be pretended that it should be received and considered at all? The very mention of such a proposition shows how absurd and preposterous it is. Yet the requirements of the statute is alike mandatory in each case, and any principle which would dispense with one, would dis-

pense with all. There is, however, still another provision in the statute, showing the correctness of the opinion of the minority of your committee on this subject.

They now refer to the provisions that, "if it shall clearly appear to the (county) canvassers, that in any statement produced to them, certain matters are omitted in such statement which should have been inserted, or that any mistakes which are clerical merely exist, they shall cause "it to be sent back to the district inspectors for correction."

This shows conclusively that the board of county canvassers cannot consider an imperfect statement, else why send it back for correction? It further shows that they cannot be allowed to correct even a clerical error in such statement, but it must be sent back for correction. It establishes beyond a question that the full statutory evidence must be produced before the county canvassers, and that they have no right to consider any other or to supply defects by the contents of imperfect statements, or by inferences and constructions. Indeed, without these authorities and arguments in support of this position, the general rule of law applicable to all like jurisdictions and proceedings would alone sustain it. It is a settled doctrine of law that officers created by a statute conferring upon them special and limited jurisdiction, for a specific object or class of objects, and prescribing the mode of its exercise, must pursue such exercise of it strictly within the limits of the power given, and according to the mode and form prescribed by such statute. Such a statute is to be strictly construed, and no power or authority is given by it beyond the plain meaning and object thereof, as expressed by its terms; all acts of such officers out of the mode and beyond the terms of the law giving the power and jurisdiction, are *coram non judice* and void. The board of county canvassers were created by statute and must be viewed as possessing only such a specific limited jurisdiction; and the mode of performing their duties, and the kind of evidence upon which they may act, are minutely prescribed by the statute creating such board.

For these reasons the minority of your committee are of opinion that the board of county canvassers erred in counting the said imperfect or defective votes in the absence of the ballots themselves, even though they would, if present, have been allowed.

Were these such defective votes as were contemplated by the Legislature in the passage of that act? It may be questionable whether those ballots containing a full name are such.

Those containing only the initials of the Christian name are clearly defective — defective in name; in the only evidence of intention, and those should all have been attached to the statements and returned.

Those containing a *full* name were defective, for the purposes for which they were claimed and used. So far they were defective, but if they contained the designation of office and a full name so as not to be defective in view of the statute, then one of each kind of such ballots should clearly have been returned attached to the statement and written upon according to the other provisions of the statute. They were of kinds different from any other kind found in the box, and the statute says that one of *each kind* shall be attached, etc. So it matters not, so far as the principle of evidence upon which the whole question rests is concerned, whether they shall be deemed defective or a separate kind of votes.

Mr. Hasbrouck, the contestant, conceives that the rights of the people of Ulster county have been violated by the board of county canvassers, in refusing him the certificate of election as a member of the Assembly, and he therefore prays that the Assembly in the exercise of its constitutional powers and duties will correct the error, admit him to the seat to which the same people elected him, and thus at the earliest practicable day repair the injury occasioned by that violation.

The certificate held by Mr. D' L' Montanye is *prima facie* evidence of his election, and to oust him and admit the contestant, it is necessary to show by evidence that such certificate is founded on error or tainted with fraud, or both.

The evidence to show that it is founded in error and exhibiting the facts therein before stated is contained in the protest in writing made by the minority (six in number) of the board of county canvassers, against the determination of such board, awarding to Mr. D' L' Montanye the said certificate, the contents of which protest are admitted by the sitting member to be true.

It has been supposed by some, that the Assembly, in the exercise of its constitutional power and duty in cases like this, were above, and might disregard the strict provisions of the election law. A little examination will show that such an idea is untenable in reason and too dangerous to be acted upon. Should it be so acted upon, the whole question, with all the rights of the people, the administration of which the question involves, would be left to the mercy of unrestrained despotic power, subject to extraneous influences, and liable to be controlled by the improper action of party spirit for the purpose of sustaining party supremacy.

It was, doubtless, in view of the danger of an improper assumption and exercise of power by either branch of the Legislature in cases like this, that the recent convention submitted a change in the terms of the new Constitution, regarding this subject with the apparent intention of bringing the exercise of the power within the limits and control of existing law, so far as the evidence upon which action is to be had is concerned. The old Constitution merely provided that "each house should be the judge of the *qualifications* of its own members." The new Constitution provides "that each house shall be the judge of the *elections, returns* and qualifications of its own members." Under the old Constitution, the House always, as occasion presented, took cognizance, and properly, of the elections and returns of its members, as constituting the evidence of qualification; but in considering such elections and returns, it was doubtful in the minds of some whether the law should limit and control the evidence, or the evidence, regardless of the law, should form the basis of action. Now, under the new Constitution, it is thought that in all cases of the kind, in

which the question depends upon the elections and returns (as it does in this case), the House is bound to consider those elections and returns according to, and controlled by, the laws under which they are held and made. What is understood by the terms "elections and returns?" Undoubtedly such, and only such as are known, conducted and made by the authority and in the manner prescribed by law. Then if the House is bound to consider the elections and returns subjected to the provisions of the laws under which they are conducted and made, then all the statutory provisions contained in the law regulating the evidence and allowance of votes, are equally as applicable to the House as to the board of county canvassers. It is manifestly proper that it should be so. It is the operation of law that provides for elections and election returns.

It is by this tenure that the members of this House hold the constitutional power to judge of them. The terms of the Constitution itself has sanctioned the law, and, in effect, declared it, in its operations, proper, safe and efficient, and in force. Can the House, then, in the exercise of its full constitutional power, legally and properly allow to either one of its members, or a contestant, votes that do not contain his name? It may do so, and from the act there is no appeal; but it would be usurpation. Can the House allow votes without the proper and required statutory evidence that they were given, or at least the proof that such evidence was furnished to the board of county canvassers? The House may do it, but the act would be usurpation. Before it should do the latter, it should pass an act to repeal all legal restraints upon boards of county canvassers. And before they venture upon the former, they should pass an act to allow each of its members to assume all such names as may be necessary to apply to a sufficient number of votes to insure his seat under all circumstances.

The minority of your committee offer the following resolutions:

Resolved, That John D' L' Montanye is not entitled to the seat in this House now occupied by him.

Resolved, That Isaac L. Hasbrouck is entitled to the seat in this House now occupied by John D' L' Montanye.

All of which is respectfully submitted.

ROBT. D. WATSON.

N. RAPPLEE.

Assembly Documents, 1847, No. 17.

On motion of Mr. T. Smith,

Ordered, That the said report be laid upon the table and printed.
Assembly Journal, 1847, vol. 1, page 114.

COMMITTEE OF THE WHOLE.

IN ASSEMBLY, *January 27, 1847.*

On motion of Mr. T. Smith, the House then resolved itself into a committee of the whole on the special order of the day, the report of the committee on privileges and elections, on the petition of Isaac L. Hasbrouck, praying to be admitted to the seat in this House now occupied by John D. L. Montanye as a member of this House, and after some time spent thereon Mr. Speaker resumed the chair, and Mr. Crosby, from the said committee, reported progress, and asked for and obtained leave to sit again.

Assembly Journal, 1847, vol. 1, page 168.

COMMITTEE OF THE WHOLE.

IN ASSEMBLY, *January 28, 1847.*

On motion of Mr. J. Smith, the House resolved itself into a committee of the whole on the special order, the reports of majority and minority of the committee on privileges and elections on the petition of Isaac L. Hasbrouck, praying to be admitted to the seat as a member of the Assembly, now occupied by Mr. John D. L. Montanye; and after some time spent thereon, Mr. Speaker resumed the chair, and Mr. Crosby, from the said committee, reported progress and asked for and obtained leave to sit again.

Assembly Journal, 1847, vol. 1, page 169.

COMMITTEE OF THE WHOLE.

IN ASSEMBLY, *January 29, 1847.*

On motion of Mr. T. Smith, the House then resolved itself into a committee of the whole on the special order of the day, the reports of the majority and minority of the committee on privileges and elections, on the petition of Isaac L. Hasbrouck, praying to be admitted to the seat in this House now occupied by John D. L. Montanye as a member of Assembly; and after some time spent thereon Mr. Speaker resumed the chair, and Mr. Crosby, from the said committee, reported progress and asked for leave to sit again.

LEAVE TO SIT AGAIN DENIED.

Mr. Speaker put the question whether the House would agree to grant the said leave, and it was determined in the negative.

JOHN D. L. MONTANYE ENTITLED TO HIS SEAT.

Mr. Blodgett moved that the House do agree to the resolutions heretofore offered by the majority of the committee on privileges and elections in the words following, to wit:

Resolved, That Isaac L. Hasbrouck is not entitled to the seat as member of Assembly from the county of Ulster, now occupied by John D. L. Montanye, and that the petitioner have leave to withdraw his petition.

Resolved, That John D. L. Montanye is entitled to the seat now occupied by him as member of Assembly.

Mr. Perkins moved to amend the said resolution by striking out all after the word "resolved," in the first resolution, and insert the words following, to wit:

That John D. L. Montanye is not entitled to the seat now occupied by him.

Resolved, That Isaac L. Hasbrouck is entitled to the seat now occupied by John D. L. Montanye.

Mr. Walsh called for the previous question.

Mr. Speaker put the question whether the House would agree to

second the call for the previous question, and it was determined in the affirmative.

Mr. Speaker put the question: "Shall the main question be now put?" and it was determined in the affirmative.

Mr. Speaker put the question whether the House would agree to the said resolutions heretofore offered by a majority of the committee on privileges and elections.

Mr. T. Smith called for a division of the question.

MR. MONTANYE AWARDED THE SEAT.

Mr. Speaker put the question whether the House would agree to the first resolution in the words following, to wit:

Resolved, That Isaac L. Hasbrouck is not entitled to the seat as member of Assembly from the county of Ulster, now occupied by John D. L. Montanye, and that the petitioner have leave to withdraw his petition.

And it was determined in the affirmative.

Ayes 71. Nays 47.

Mr. Speaker then put the question whether the House would agree to the said second resolution, in the words following, to wit:

Resolved, That John D. L. Montanye is entitled to the seat now occupied by him as member of Assembly.

And it was determined in the affirmative.

Ayes 70. Nays 49.

Mr. Cornwell moved that the House do reconsider the vote upon the said resolutions, and called for the previous question thereon.

Mr. Speaker put the question whether the House would agree to the said motion, and it was determined in the negative.

Mr. Speaker put the question whether the House would agree to second the call for the previous question, and it was determined in the affirmative.

Mr. Speaker then put the question: "Shall the main question be now put?" and it was determined in the affirmative.

Mr. Speaker then put the question whether the House would agree to the said motion of Mr. Cornwell. and it was determined in the negative.

Ayes 39. Nays 72.

ON ALLOWANCE OF MILEAGE AND PER DIEM TO MR. HASBROUCK.

IN ASSEMBLY, *January 29, 1847.*

Mr. T. Smith offered, for the consideration of the House, a resolution in the words following, to wit:

Resolved, That there be paid out of the contingent fund of this House, for each day the said Hasbrouck has been in attendance prosecuting his claim to a seat in this House; also his mileage to and from his place of residence.

Mr. Develin moved to amend the said resolution by adding the following words, to wit: " And the expenses which the contestant has actually incurred in prosecuting his claim to the seat occupied by John D. L. Montanye as member of the Assembly.

Mr. T. Smith moved to amend the said amendment of Mr. Develin by adding the following words, to wit:

And also, that John D. L. Montanye be paid in like manner the expenses actually incurred by him in the investigation of the before mentioned case.

Mr. Speaker then put the question whether the House would agree to the said amendment of Mr. T. Smith, and it was determined in the negative.

The question then recurring on the amendment offered by Mr. Develin,

Mr. Potts moved that the resolution and amendment be referred to the committee on the judiciary to report to-morrow.

Mr. Speaker put the question whether the House would agree to the said motion, and it was determined in the affirmative.

Assembly Journal, 1847; vol. 1, pages 173, 174, 175, 176, 177 and 178.

REPORT OF COMMITTEE ON THE JUDICIARY, RELATIVE TO MILEAGE
AND PER DIEM OF ISAAC L. HASBROUCK.IN ASSEMBLY, *January 3, 1847.*

Mr. Potts, from the committee on the judiciary, to which was referred the resolution and amendments relative to the payment to Isaac L. Hasbrouck of per diem and mileage, in prosecuting his claim to a seat in this House as member of Assembly, reported favorably thereto, and asked leave to bring in a bill.

LEAVE GRANTED TO BRING IN A BILL.

Leave being granted, Mr. Potts accordingly brought in the said bill, entitled "An act granting per diem and mileage to Isaac L. Hasbrouck while prosecuting his claim to a seat as member of Assembly in the place of John D. L. Montayne," which was read the first time, and, by unanimous consent, was also read a second time, and committed to a committee of the whole House.

By unanimous consent, the House resolved itself into a committee of the whole on the bill entitled, "An act granting per diem and mileage to Isaac L. Hasbrouck, while prosecuting his claim to a seat as member of Assembly, in the place of John D. L. Montayne;" and after some time spent thereon, Mr. Speaker resumed the chair, and Mr. Cornwell, from the said committee, reported that the committee had gone through the said bill, made sundry amendments thereto, and as amended, reported the same complete.

Mr. Speaker put the question, whether the House would agree to the said report, and it was determined in the affirmative.

On motion of Mr. Burnell,

Ordered, That the said bill be read the third time.

By unanimous consent the said bill was then read the third time and passed.

Ayes, 105. Nays, 000.

Assembly Journal, 1847, vol. 1, pages 182, 183.

BILL PASSED THE SENATE.

IN ASSEMBLY, *February 10, 1847.*

A message from the Senate was received and read, informing that they had passed the bill therewith returned, entitled "An act granting per diem and mileage to Isaac L. Hasbrouck while prosecuting his claim to a seat as member of Assembly, in the place of John D. L. Montanye," without amendment.

Ordered, That the clerk deliver the said bill to the Governor.
 Assembly Journal, 1847, vol. 1, page 263.

Case of Morgan Johnson and Solomon Moss.

FIRST DISTRICT NIAGARA COUNTY — PETITION OF MORGAN JOHNSON PRESENTED.

IN ASSEMBLY, *January 5, 1848.*

Mr. Ransom presented the petition of Morgan Johnson, claiming a seat as member of this Assembly from district number two in the county of Niagara, which was read and referred to the committee on privileges and elections.

Assembly Journal, 1848, page 34.

REPORT IN PART OF COMMITTEE ON PRIVILEGES AND ELECTIONS
 — COMMITTEE ASK POWER TO SEND FOR PERSONS AND PAPERS.

Mr. Raymond, from the committee on privileges and elections, to which was referred the petition of Morgan Johnson, praying for the seat occupied by Solomon Moss, as a member of this House, reported in part, and offered for the consideration of the House a resolution in the words following, to wit:

Resolved, That the committee on privileges and elections, to which was referred the petition of Morgan Johnson, claiming the seat as a member of Assembly now held by the Honorable Solomon Moss, from the second district of the county of Niagara, be and is hereby authorized to send for all and every such person and paper as in their judgment may be necessary for the full investigation of the matter so referred to them.

SUBSTITUTE OFFERED.

Mr. Coe offered the following as a substitute for the said resolution, which was accepted by Mr. Raymond, to wit:

COUNTY JUDGE AUTHORIZED TO TAKE TESTIMONY, PURSUANT TO STATUTE.

Resolved, That the standing committee on privileges and elections are hereby instructed to receive testimony, which shall be taken before the county judge of Niagara county, in relation to the contested seat of one of the members of this House from said county, in pursuance of the provisions of title fifth, chapter seventh, of part first, of the Revised Statutes.

Debate was had thereon, when Mr. Pruyn moved that the said resolution be laid on the table.

Mr. Speaker put the question whether the House would agree to the said motion of Mr. Pruyn, and it was determined in the affirmative.

Assembly Journal, 1848, pages 128, 129.

COUNTY JUDGE, NIAGARA COUNTY — COMMUNICATION FROM.

IN ASSEMBLY, *February* 15, 1848.

A communication from the county judge of Niagara county, addressed to the clerk, in relation to the seat of Mr. Moss, contested in this House by Morgan Johnson, from the county of Niagara, was received and read in the words following, to wit:

To the Clerk of the Assembly of the State of New York:

SIR.—In obedience to the statute in such case made and provided, I enclose to you the accompanying evidence taken before me in the matter of the contest by Morgan Johnson of the election of Solomon Moss, as a member of the Assembly of this State.

Very respectfully, etc.,

H. GARDNER.

LOCKPORT, *February* 8, 1848.

Assembly Documents, 1848, No. 147.

Ordered, That the said communication be referred to the committee on privileges and elections.

Assembly Journal, 1848, page 379.

REPORT OF MAJORITY OF THE COMMITTEE ON PRIVILEGES AND ELECTIONS.

IN ASSEMBLY, *March 23, 1848.*

Mr. Raymond, from the committee on privileges and elections, to which was referred the petition of Morgan Johnson, praying for the seat in this House as a member of Assembly from the second Assembly district in the county of Niagara, now occupied by Solomon Moss, reported as follows, to wit:

REPORT OF THE MAJORITY OF THE COMMITTEE ON PRIVILEGES AND ELECTIONS, ON THE PETITION OF MORGAN JOHNSON, PRAYING FOR THE SEAT IN THE HOUSE OF ASSEMBLY NOW OCCUPIED BY SOLOMON MOSS.

Mr. Raymond, from a majority of the committee to which was referred the petition of Morgan Johnson, praying for the seat in this House now occupied by Solomon Moss, from the second Assembly district in the county of Niagara, reports that they have had the same under consideration; that the said Morgan Johnson and Solomon Moss appeared before your committee, both in person and by counsel; that an attempt was made by the counsel of said parties, in the first instance, to agree upon a statement of facts which should present the whole case without resorting to the trouble and expense of taking testimony. This attempt proved unsuccessful, and it then became necessary to send to the county of Niagara to take testimony. Previous to the taking of such testimony, the committee decided, in accordance with the precedents of this House in former years, and the rule as adopted in the case of Crosby against Pierce, in the year 1846, and the case of Hasbrouck against Montanye, of the last House, that they would receive no testimony back of the ballot-boxes as to the qualification of voters, but would determine the question of the contested seat upon the ballots which were actu-

ally cast, and would receive all evidence in relation to the action of the town and county canvassers in receiving, counting and canvassing the votes given.

It was admitted by the parties, that by the result of the official canvass, as declared by the board of county canvassers of the county of Niagara, Solomon Moss, the sitting member, had received three more votes in the said Assembly district than Morgan Johnson.

The said Morgan Johnson rests his claim to the said seat mainly upon the two following grounds:

1. That in election district number one, in the town of Newfane, in said Assembly district, the inspectors of election improperly and illegally counted and allowed a double ballot to said Solomon Moss, and at the same time illegally rejected and destroyed a ballot for said Johnson, thereby making a difference of three votes against said Johnson and in favor of said Moss. Also, that said election was illegal in consequence of a person being allowed to act as an inspector without being sworn.

2. That the election in the second election district in the said town of Newfane, so far as pertains to the Assembly vote, should be set aside for illegality and misconduct on the part of the majority of the inspectors of election. That the inspectors in this election district, in their certificate to the board of county canvassers, allowed Solomon Moss a majority of eight votes over Morgan Johnson, which, if set aside, would elect Mr. Johnson by a majority of five votes, to which, if there be added the three votes which he claims in the first election district in said town, would increase his majority to eight.

The counsel for Mr. Moss alleged that the inspectors of election in two or three towns had conducted the election illegally or improperly, to his prejudice, but as these allegations were none of them followed or supported by any proof, the committee deem it unnecessary to notice them in their report.

In support of the allegations of Mr. Johnson, are produced a certified copy of the returns of the inspectors of election in election

district number two of the town of Newfane, which in the document hereunto annexed is marked B; also the testimony taken in pursuance of an order of this House, before Hiram Gardner, Esq., judge of Niagara county court, in the presence of both parties, and in the accompanying document is marked C.

No attempt is made to impeach the character or veracity of any of the witnesses, most of whom are officers of elections of the several towns, and presumed to be gentlemen of respectability. The committee have examined the testimony, and consider it entitled to full credit.

From this testimony it appears that in canvassing the votes in the first election district of the town of Newfane, a man by the name of Benjamin Stout, who was not an inspector, was permitted to act as such without being sworn. That after having counted the ballots, and found them to agree with the poll list, the inspectors proceeded to open and canvass the same, and after having proceeded a short time, Mr. Stout found a ballot which he declared to be double, and which he opened, and while opening, one ballot fell on the table while he held the other in hand, both of which were for Solomon Moss.

The inspectors, with a view of ascertaining whether this was a double ballot, stopped canvassing and proceeded again to count the ballots, to see whether they would correspond with the poll list, and upon such counting they found that by counting the double ballot for two votes it made an excess of one vote. The inspectors, instead of destroying said double ballot as the law required, allowed both votes to Mr. Moss, and then proceeded and drew out a ballot from the Assembly box to avoid this excess, and destroyed it; this proved to be a ballot for Mr. Johnson for Assembly.

The law declares (article 4, section 37 of Revised Statutes, volume 1, page 141, third edition) "that if two or more ballots shall be found so folded together as to present the appearance of a single ballot, they shall be destroyed, if the whole number of ballots exceed the whole number of votes, and not otherwise." The object of this statute is to prevent fraud and punish fraudulent

voting, by declaring that every elector who conducts himself in that way shall forfeit his right of suffrage upon that occasion. If the inspectors were correct in counting the ballots and comparing them with the poll list in the first instance, then this excess could arise in no other way than by considering the ballot in question a double ballot. If this circumstance is taken in connection with the declaration of Mr. Stout at the time of opening the ballot, and the fact of his retaining one ballot in his hand and at the same time dropping the other on the table, which was at the same time picked up by one of the inspectors and placed under the candlestick and subsequently allowed to Mr. Moss, it seems to your committee that there could scarcely have been any room for doubt as to the character of that ballot. It may be urged, it is true, that the fact of this ballot being counted by the inspectors (the said double ballot being found by Mr. Stout and separated by him, leaving no opportunity of examining it by the other inspectors), is evidence that they did not consider it double. This inference might be drawn from that act, if there was no proof to show that they come to a different conclusion; but your committee believe that the testimony of James Van Horn, Jr., one of the clerks, and Ira Tompkins, one of the inspectors, shows that they did consider it a double ballot, especially after counting and finding that it made an excess of one vote, which did not exist before; and that their error consisted in the manner of disposing of it, after being satisfied of that fact. If these three votes should be allowed in favor of Mr. Johnson, it would leave the parties a tie.

But from the view which your committee have felt bound to take of the other branch of this case, it is hardly necessary to dwell upon this point any longer.

The great and important question involved in this case, in the judgment of your committee, arises out of the proceedings in election district number two, in this same town of Newfane. It will be seen from a certified copy of the returns made by the inspectors of election in this district, that Solomon Moss was allowed a majority of eight votes over Morgan Johnson.

The accompanying document, marked C, shows that four witnesses were called on the part of Mr. Johnson, including one of the inspectors and one of the clerks, to testify in regard to the manner in which this election was conducted; and that no witnesses were called, on the part of Mr. Moss, to contradict or vary the statements of these witnesses.

The testimony of these witnesses, in connection with the certified copy of the returns from that district, establishes the following facts:

That there were three inspectors presiding at that election, two of whom belonged to the democratic and the other to the whig party.

That after the board was organized, and before any votes were taken, the two democratic inspectors decided (the other protesting against the decision) that they would keep no separate Assembly box, and that the names of all the candidates voted for should be upon one ballot, indorsed "State," and that an elector could not vote for members of Assembly unless the name of the candidate should be placed upon the State ticket.

That the friends of Mr. Johnson came to the polls with printed ballots cut and folded separately for two boxes, one indorsed "Assembly," and the other "State." That the friends of Mr. Moss, on the other hand, came with a printed ballot, having his name for member of Assembly printed upon the ticket with the candidates for other offices, and indorsed "State."

That in consequence of this decision of the inspectors, it became necessary for the friends of Mr. Johnson, in order to vote at all for him for Assembly, to lay aside their Assembly ballots, and set about writing his name upon the State ballot.

It also appears that the single Assembly ballot was offered and rejected by the majority of the board of inspectors; that some of the friends of Mr. Moss were engaged in circulating a printed State ticket, containing the names of all the whig candidates, except that of Hamilton Fish, in the place of which Nathan Dayton was substituted, which had upon it no name for member of Assembly, and

was called the "Dayton ticket." That in canvassing, seven or eight of these tickets were found in the box, and only one of them had upon it the name of any candidate for Assembly, and that was Morgan Johnson. Alonzo Avery, one of the electors who voted this "Dayton ticket," supposed he was voting for Mr. Johnson for Assembly, and who after voting found his mistake, and then wanted to vote for said Johnson, but was prevented from doing so by the decision of the board above referred to. It further appears, from the returns of the inspectors of said district, that there were five more ballots cast for State officers than for members of Assembly, and that whilst there was a difference of but one between the democratic and whig State ballots, there was a difference of eight between the names for member of Assembly on the State ballot. The whole number of ballots cast in this election district indorsed "State" was two hundred and thirty-seven, and the whole number of names for member of Assembly upon those State ballots was only two hundred and thirty-two.

That when the inspectors came to canvass the votes, they found an excess of one ballot indorsed "State," and they then drew out one ballot from the box and destroyed it, which in size and print corresponded with the whig ticket.

Upon these facts, we are called upon to decide whether here has not been such an omission of duty and departure from the requirements of the Constitution and laws of this State, on the part of the inspectors of election in this election district, as either to defeat the popular will or to render it unsafe to rely upon the result as certified by them as a fair expression of it.

Whilst it will be conceded that the certificate of election by the board of county canvassers is *prima facie* evidence of the right of the sitting member to his seat, it must be borne in mind that this House, by a constitutional provision (see article third, section tenth of the new Constitution), is made the exclusive "judge of the election returns and qualifications of its own members." The board of county canvassers act *ministerially* and not *judicially*. They are required to ascertain and declare the result from the returns

made to them by the town inspectors, and have no right to review their decision or correct their errors. But to the House belongs the duty of correcting all errors or illegal proceedings committed by the district inspectors of election or county canvassers, whether through mistake or design, in regard to the election of its members.

The law under which the election was held (see Session Laws of 1847, page 263, chapter 240, section 9, subdivision 2), requires that the name of the person voted for member of Assembly, in counties entitled to more than one member, shall be upon a separate ballot, indorsed "Assembly," and also that the inspectors of elections shall provide and keep a separate box, indorsed "Assembly," in which the separate Assembly ballot can be deposited (see section twenty-four), and also requires the clerks to keep a separate poll list, headed Assembly. To prevent any misconstruction of these provisions, or any mistakes in regard to them under this new law, the Secretary of State had prepared, for each election district in this State, forms adapted to them; and his instructions thereon will be found in the pamphlet prepared by him, in pages 75 and 83, No. 9 and No. 15; the law and instructions on the subject are positive.

The law requiring a separate Assembly box, and a separate ballot in counties containing more than one Assembly district, grows out of the provision of the new Constitution requiring a residence of the elector for thirty days next preceding the election in the district from which the officer is to be chosen for whom he offers his vote.

This is a new provision and shows that an elector may have a right to vote the State ballot, and not the Assembly. A different oath is required in the one case from what is required in the other. The consequence is, that if the name of the Assembly candidate is put upon the State ballot in such a district, there is no oath adapted to the ballot, no challenge could be enforced, and no illegal ballots excluded or detected.

It will also be seen that when there is no separate box or poll lists kept for the Assembly, there can be no mode of correcting a discrepancy between the poll list and number of votes. In this case, there was an *excess* of one State ballot, when there was a *deficiency*

of *five* Assembly votes. One State ballot was drawn, which must have carried with it an Assembly vote, unless it was one of the six "Dayton tickets," which contained no Assembly candidate.

The inspector, from the appearance of the *ballot* and the *style* of the print, judged it to be a whig ballot, and, if so, Mr. Johnson here lost one vote in consequence of no separate Assembly box being kept. Another difficulty growing out of this mode of procedure is, that after an elector has voted a State ticket, he is precluded from voting for member of Assembly, which would not be the case if two boxes were kept. In this case, those who voted the "Dayton ticket," after finding that they had not voted for member of Assembly, could have supplied the omission, had there been an Assembly box kept. It will be seen that one of them swears that he wanted to do so, but found that he could not.

It seems to your committee hardly worth while to pursue this matter further to show the consequences which would result from tolerating a practice of this kind, or to demonstrate that under it no reliance can be placed upon the result as the expression of the popular will. Your committee are aware that there are a great many provisions in our election laws which are regarded as merely dictory, and where an omission or neglect on the part of the inspectors to comply with the forms of proceedings, have been held not to vitiate an election, but it will be seen that the decisions in those cases are based upon the ground that the intention of the elector shall be ascertained, wherever it can be, and whenever the departure from the law has not been such as either to defeat this intention or to prevent its being ascertained, it has been disregarded.

Now to apply this principle to this case. It cannot be denied but what here was a denial of the exercise of the right of suffrage by a majority of the inspectors, to the electors in the only way authorized by the Constitution and laws. If permitted to vote at all for members of Assembly, it was not in pursuance of law, but in violation of law. It is impossible to ascertain, with any certainty, what effect this decision had upon the election, but, from the testimony

before us, it is fair to presume that it was sufficient to change the result between the parties. If there had been two boxes and two separate ballots voted, there would have been no change for the perpetration of any wrong or fraud with the "Dayton ticket," so far as the Assembly candidates were concerned.

How does it happen that the "Dayton tickets" (with one exception, which is accounted for), and those alone, contained no candidate for Assembly? Are we to presume that there were six whigs who voted the "Dayton ticket" who would not vote for Mr. Johnson, when all voting the other whig State ticket did vote for him? Such a presumption would be wholly unwarranted by the circumstances of the case.

We think the fair presumption, from the testimony, is that these electors supposed they were voting for all the whig candidates except Mr. Fish.

But, it may be asked, what effect the setting aside of the election so far as pertains to members of Assembly in this election district, would have upon the other portion of the ticket? We think it would not vitiate it, for the reason that the error consists in voting the Assembly and not the other candidates upon a wrong ballot and in a wrong box.

If an elector undertakes to vote for more candidates upon the same ticket than there are persons to be chosen to the office designated, the whole ballot is not to be destroyed, but in the language of the Secretary of State, "so far as the ballot is correct for each description of officers, it should be canvassed and estimated, and the remainder only rejected." See his instructions under form No. 18, page 86.

Suppose two boxes had been kept, and the names of the candidates for State officers were found upon an Assembly ballot with the candidate for Assembly, could it be allowed? If so, then the elector might have the advantage of voting twice for the same candidates. But this cannot be the case when a ballot properly indorsed is found in the wrong box, through the fault of the inspectors. If the foregoing reasoning is correct then it follows, as a

matter of principle without regard to consequences, that the inspectors erred fatally in their first decision as to the mode of voting; and secondly, they erred in not rejecting in the canvass all the names for Assembly candidates upon the State ticket as illegal or defective ballots. In either event Morgan Johnson would have a majority of the legal votes cast in the Assembly district.

The basis of representation is suffrage. The right to choose representatives is every man's part in the exercise of sovereign power—to have a voice in it if he has the proper qualifications; that is, the fundamental exercise of political power by every elector. That is the beginning. That is the mode in which power emanates from its source and gets into the hands of conventions, legislatures, courts of law and the chair of the executive. It begins in suffrage. Suffrage is the delegation of the power of an individual to some agent. If this be so, then follow two other great principles.

1st. The first is, that the right of suffrage shall be guarded, protected, secured against force and against fraud, and

2d. The second is, that its exercise shall be prescribed by previous law; its qualifications shall be prescribed by previous law; the time and place of its exercise shall be prescribed by previous law; the manner of its exercise, under whose supervision, always sworn officers of the law, is to be prescribed. And then, again, the results are to be certified to the central power by some certain rule—by some known public officers—in some clear and definite form, to the end that two things may be done: first, that every man entitled to vote may vote; second, that his vote may be sent forward and counted, and so he may exercise his part of sovereignty in common with his fellow men.

In the exercise of political power through representatives, we know nothing; we never have known anything but such an exercise as should be carried through the prescribed forms of law, and when we depart from that, in any of its substantial provisions, we shall be endangering our institutions, and left like a ship at sea, “without rudder or compass.”

The people limit themselves in various ways; they limit themselves in this first exercise of their political rights; they limit themselves by their Constitution in two important respects; that is to say, in regard to the qualifications of the electors, and in regard to the qualifications of the elected. They have said, we will elect no man who has not such and such qualifications. We will not vote ourselves without we have such and such qualifications. They have also limited themselves to certain prescribed forms for the conduct of elections. They must vote at a particular place, at a particular time, and under particular conditions, or not at all. It is in these modes that we are to ascertain the will of the people, and our Constitution and Laws know no other mode.

The undersigned, a majority of your committee, have, therefore, come to the conclusion, that it would be establishing a very dangerous precedent for this House to allow inspectors of elections, who are the agents of the electors, to disregard the Constitution and Laws, provided for their protection, and manage the polls according to their own fancy, thereby preventing the electors from exercising their suffrages. We cannot, therefore, sanction the conduct of said inspectors of election, without holding out a positive inducement to disregard the "Constitution and Laws of this State," as well as the regulation and instructions of the Secretary of State for protecting the fairness and preserving the purity of elections. And ask leave to introduce the following resolutions:

Resolved, That Solomon Moss is not entitled to the seat as member of Assembly, now occupied by him.

Resolved, That Morgan Johnson is entitled to the seat as member of Assembly, now occupied by Solomon Moss.

All which is respectfully submitted,

SAML. G. RAYMOND,
G. W. BUCK,
ROBERT H. PRUYN.

March 21st, 1848.

On motion of Mr. Myers,

Ordered, That the said report be laid on the table.

Mr. Ransom moved that five times the usual number of the said report be printed for the use of the Legislature.

Ordered, That the said motion be referred to the committee on public printing.

Assembly Journal, 1848, page 823.

REPORT OF THE MINORITY OF THE COMMITTEE ON PRIVILEGES AND
ELECTIONS.

IN ASSEMBLY, *March 25, 1848.*

Mr. Myers, from a minority of the committee on privileges and elections, to which was referred the petition of Morgan Johnson praying for the seat in this House as member of Assembly from the second Assembly district in the county of Niagara, now occupied by Solomon Moss, report against the petition, as follows:

MINORITY REPORT.

The undersigned minority of the committee on privileges and elections, to whom was referred the petition of Morgan Johnson, beg leave to report:

That the said committee have had the same under consideration, with the proofs submitted on the part of the contestant and herewith submitted, and that it was admitted by both parties that Solomon Moss had been declared by the county canvassers duly elected by a majority of three votes.

The undersigned conceive the indisputable and only safe or tolerable rule to be, that the sitting member having received the certificate of the only regular and constituted tribunal having jurisdiction in that behalf, is to be presumed to be elected. That this presumption can only be overcome by express proof to the contrary, and that the *onus probandi* lies upon the contestant. The rule is a familiar and fundamental one, that every public act or proceeding of any constituted public body or public officer having jurisdiction of the

subject-matter, is to be presumed regular until the contrary is established by proof and that inferior or secondary proof is not admissible until the absence of the higher or primary proof is satisfactorily accounted for.

The undersigned believe that their difference of opinion with the majority of your committee arises from their adherence to the rules aforesaid, which, in their judgment, the said majority have departed from in their consideration of this subject.

The undersigned fully admit that this House is the sole judge of the qualifications of its members, but they do not admit that this power can be rightfully exercised arbitrarily or in violation of the rules of evidence or of the uniform and well settled principles of law or the practice of representative bodies. These are the protection and the only protection of minorities in representative assemblies, and if this power be not so restrained, if this right to judge is not thus limited, then majorities, even small majorities, have it always in their power to annihilate opposition.

Only two points were made and argued before the committee:

1st. That in election district No. 1, in the town of Newfane, the inspectors of election improperly and illegally counted and allowed a double ballot to Moss, and at the same time illegally destroyed a ballot for Johnson, thereby making a difference of three votes against Johnson. Also, that said election was illegal in consequence of a person being allowed to act as an inspector without being sworn.

2d. That the election in the second election district in the town of Newfane, so far as pertain to the Assembly vote, should be set aside for illegality and misconduct on the part of a majority of the inspectors of election. That the inspectors of this election district in their certificate to the board of county canvassers, allowed Solomon Moss a majority of eight votes over Morgan Johnson, which, if set aside, would elect Mr. Johnson by a majority of five votes, to which, if there be added the three votes which he claims in the first election district in said town, would increase his majority to eight.

The first of these points it was unanimously agreed at the last meeting of your committee, was not made out and should be considered as waived and not mentioned in the report, and the undersigned were much surprised to see in the majority report that this point is still insisted upon through some pages of manuscript.

The undersigned insists that there is no legal evidence of the fact alleged in regard to the double vote; at the best, no such evidence as the contestant was bound to produce to substantiate his point. It is proven that the inspectors first counted the ballots and pronounced them to agree with the poll list in number; that they then commenced to open and read the ballots, and in the language of the witness, Van Horn, "after reading from a dozen to twenty or thereabouts, Mr. Benjamin Stout said, 'here are two votes or two ballots together;' we then stopped tallying and proceeded to count the votes again to see whether there would be an excess." Mr. Ira Tompkins testifies (and he was an inspector produced by Mr. Johnson), "Mr. Stout was sitting by the side of me at said canvass, and after having proceeded to open the ballots and to tally the same a very short time, Mr. Stout spoke and said they found a double vote, and at the same time held a vote in his hand over the table, and *I observed a vote fall from his hand*, and picked it up, etc." They then proceeded to count the ballots again, and finding an excess of one, replaced them all in the box and mixed them, and Mr. Tompkins held the box to Mr. Reynolds, who drew one out and handed it to Mr. Tompkins, who destroyed it.

These are the material facts proven on this point. It is true Mr. Tompkins is made to swear that the ballot destroyed was for Johnson; a fact which he could only know by a violation of the spirit if not the letter of the law, which declares the ballots so drawn "shall be destroyed unopened, and without seeing the same;" and these ballots having before been opened, it would seem that a proper appreciation of the intent of the law would have impelled the inspector to destroy the vote so open without reading it, but the undersigned presume that this and other similar facts of a partisan

character urged in the report of the majority of your committee, will not influence the judgment of this House.

The statute 1 R. S., part 1, chapter 6, title 4, article 4, § 37, provides, "each box being opened, the ballots contained therein shall be taken out and counted unopened, except so far as to ascertain that each ballot is single; and if two or more ballots shall be found so folded together as to present the appearance of a single ballot, *they shall be destroyed if the whole number of ballots exceed the whole number of votes, and not otherwise.*"

Section 39 of the same statute provides, "if the ballots shall be found to exceed in number the whole number of votes in the correspondent columns of the poll lists, they shall be replaced in the box and one of the inspectors shall, *without seeing the same*, publicly draw out and destroy so many ballots unopened as shall be equal to such excess."

The inspectors are made the judges whether it is the case of a double ballot, or of a mere excess. If the former, the elector loses his vote, by the destruction of both; if the latter, the excess only is destroyed. The exercise of this discretion is not easy of review by this House, because the decision depends entirely upon *inspection* at the time, and no description can give to this House the same means of judging as to those who were present. The decision, therefore, of the inspectors upon such a point in the absence of any proof of bad faith, should be conclusive. Did they decide? We think they did, by taking the course prescribed *for an excess* and not that for a *double ballot*. This is conclusive as to what was the judgment of the inspectors. Can this House say from the evidence that they erred? Is it certain that the first count was accurate, and that then there was not an excess? What more common than an error of one in counting several hundred? But it seems to the undersigned the judgment of the inspectors in this respect should govern, and that they not having found or treated this as a double ballot, this House cannot do so.

And what evidence is there that there was a double ballot? Why, it rests in the fact that the first count agreed with the poll

list; that "*Mr. Stout said there was a double vote,*" and that the second count showed an excess of one. Now this is a fact which the contestant is bound to prove if it existed, and to prove by the *best evidence* or to lay the foundation for the introduction of secondary evidence by showing that the best was beyond his reach. There is no proof but that Mr. Stout might have been produced as a witness, and he was the only person who *knew* whether the ballot was or was not double. The inspector only saw that "he held a vote in his hand over the table, and observed a vote fall from his hand," and the clerk, Mr. Van Horn, only swears, "Mr. Benjamin Stout said, 'Here are two votes or two ballots together.'" This evidence is therefore entirely hearsay, upon which no man in a court of justice would be deprived of a sixpence, and upon which the undersigned are confident no man will be deprived of a seat in this House. The positive proof was within the reach of the contestant, as must be presumed in the absence of proof to the contrary, and it is further to be presumed would have been produced if it would have advanced his interests. Mr. Stout may have declared the ballot double upon an impression which would not stand the scrutinizing test of a cross-examination. He might have used the words as the expression of an opinion, not the assertion of a fact; he might have said it mischievously or corruptly, and still, if proof of his having said so is allowed to establish the fact, a member might be deprived of his seat in this House by such mistake, want of precision or corruption.

The second branch of the first point, "that the election was illegal in consequence of a person being allowed to act as an inspector without being sworn," may be dismissed with the remark, that it is not insisted on in the majority report. It is not proven in the evidence submitted, and if it were, would come within the principle hereinafter discussed.

It remains to consider the second point made before the committee. That upon the decision of the inspectors of the second election district of the town of Newfane, that they would use but one box and that the Assembly vote should be taken upon the State ticket.

The "act entitled an act respecting elections other than for militia and town officers, passed April 5th, 1842," provided in this respect by section 9: "the names of all the persons voted for by any elector at any election excepting electors for President and Vice President, shall be upon one ballot, which ballot shall be indorsed State." This statute had been for some years in force, and by it the vote for member of Assembly in all counties was upon the ticket indorsed 'State,' and deposited in the box marked 'State.'"

The act amending the act last above mentioned, passed May 8th, 1847 (Laws of 1847, page 264, section 9), provides in subdivision 2, of said section: "In counties entitled to more than one member of Assembly the name of the person voted for by any elector for member of Assembly at any election, shall be upon a separate ballot and indorsed 'Assembly;'" and on page 266, in section 13, which directs the boxes to be kept, is found the following provision: "Also in the proper counties a box in which all ballots which are required by the said ninth section to be indorsed 'Assembly,' shall be deposited."

The testimony shows that in the county of Niagara there were two Assembly districts, and that in the second election district in the town of Newfane, in the second Assembly district, of that county the inspectors of elections decided according to the testimony of Mr. Enoch Stahl, "that the law did not require but one box;" which decision was made by the majority of the inspectors, whom Mr. Stahl testifies under Mr. Moss' objection, were democrats.

It is seen by the statute above extracted, that this decision of the inspectors was erroneous, and this is fully conceded by the undersigned, and that it is to carry with it all the legal consequence of error in such particular, notwithstanding there is no kind of proof of *intentional wrong* on the part of the inspectors, or that the law which was then lately passed and was then for the first time to be brought into practical application was brought to their actual notice or knowledge; still, by *legal presumption* every man, and

more particularly every public officer, is presumed and bound to *know what the law is*.

Is there any evidence that this decision of the inspectors actually altered the result against the contestant; that by it any person was prevented voting for Mr. Johnson, who would have otherwise done so? If this is proven, the undersigned admit it to be within the power and duty of this House to correct; but it must be *proved* by the contestant, and is not to be *presumed*, the *onus probandi* lies upon Mr. Johnson.

The only evidence material to this point which has been adduced is as follows: Mr. Bostwick in his direct examination testifies: "There were votes indorsed for 'Assembly,' separate from the State officers offered to the board and rejected. I do not know, however, that there was more than one such occurrence, nor do I recollect who it was that offered that vote." And on his cross-examination he testifies: "I do not know but the person who offered the separate Assembly ticket, and whose vote was rejected as stated in my direct examination, afterwards voted, nor do I know whether he did or not vote for member of Assembly."

Mr. Philander Ward testifies: "I think I offered to vote for member of Assembly by a ticket which was separate from the State ticket, and that it was rejected by the board because it was so separate from the State ticket; I do not recollect of seeing any other such ticket offered."

This, in the absence of all other proof, may fairly, nay must be presumed to be the offer mentioned in the testimony of Mr. Bostwick, above extracted.

On his cross-examination, Mr. Ward testifies: "I voted at the said election poll for Morgan Johnson for member of Assembly, after I had so offered the separate vote which was rejected, as before stated."

Thus far, then, there is no evidence that Mr. Johnson was prejudiced by the said erroneous decision of the inspectors. The contestant, in defiance of the resolution of the committee, mentioned in the

it is perhaps sufficient to remark that the whole thing stood under the decision of the inspectors, precisely as by law it would in a county where there is but one Assembly district. That the qualification for an elector for member of Assembly includes all the qualifications required for the other officers, and therefore no man entitled to vote *that ticket* could be excluded from any other, and that the evidence that the ticket drawn was a "whig ticket," rests only on vague presumption, and inadmissible hearsay, and all stop short of showing it was a vote *for Mr. Johnson*.

The position that all these ballots are to be rejected *because they are found in the wrong box*, in a district where but one box was kept, the undersigned will not here attempt to refute by argument. If some hundred of electors are to be disfranchised upon a position like this, the undersigned will leave that work to the "responsible majority."

It now only remains to consider what is the effect upon the election of a departure by the inspectors of the requirement of the statute to keep a separate box in counties entitled to more than one member of Assembly. It has been shown that no injury is proven; or, at most, the injury, by the most liberal construction, can only extend to one vote, that of Mr. Avery, which, if admitted to be properly established (and the undersigned by no means concede it is) would not affect the result. The majority of the committee insist that this erroneous decision vitiates the whole poll, and that it must be all set aside as to Assembly. The reason would be quite as strong to set it aside as to the rest of the ticket. They say, however, that though other provisions of the statute are "directory," this is matter of substance. The undersigned do not think this provision more matter of substance than many other provisions of the statute which have been held to be directory, and that a departure, though it might subject the inspectors to indictment and punishment, does not destroy the ballots cast; the intention of the electors governs.

The provisions regulating the mode of proceeding at an election

are so far directory that a departure from them never vitiates, unless it is clearly shown by the contestant that a compliance with them would have produced a different result.

In other words, it is not sufficient ground for interfering that some prescribed form has been departed from or omitted, but *the contestant must show* that if the form had been observed the result would have been in his favor. The consequences of a contrary doctrine would vitiate every election, and the principle contended for would put it in the power of any board of inspectors to disfranchise all the electors in their district by intentionally making an erroneous decision, and visit the sins of the guilty inspector upon the innocent elector; a state of things not to be endured.

Take, for example, a few of the numerous provisions of the statute, from which the one under consideration cannot be distinguished. 1 R. S., 140, § 31, 3d ed., declares that each inspector shall challenge every voter whom he knows or suspects not to be qualified. Suppose it could be proven that an inspector willfully neglected to perform this duty, would that set aside the whole poll?

Section 28 provides, where the inspectors receive a ballot, one of them, without opening the same, shall deposit it in a box, etc. Suppose it could be proved that he opened and read it, and then put it in, would that vitiate the whole poll, or even that particular ballot?

Section 37. In canvassing, each box being opened, the ballots contained therein shall be taken out and counted *unopened*, except so far as to ascertain that such ballot is single. If it were proven that it was opened rather more than was necessary, would that vitiate either the ballot or the poll?

There are a variety of other provisions of a like character; we will refer to only one or two more. The law is rigid in forbidding the receipt of illegal or spurious votes, much more so than as to the form of receiving legal ones, and with good reason. Yet, suppose the inspectors knowingly and willfully receive illegal votes, is the election thereby vitiated? Most clearly not, and the law pre-

sumes so strongly against the contestant that he must show both the deviation and the injury. The supreme court of Massachusetts, in *First Parish of Sudbury v. Steans*, 21st Pickering, 154, says: "It is no objection to an election that illegal votes were received, unless the illegal votes changed the majority; the mere fact of their existence never avoids an election." "The burden of proof, too, is always upon the persons contesting the election." (See, also, *ex parte Murphy*, 7 Cowen, 153.)

In some cases the law expressly directs the period within which a canvass shall be commenced and completed; as, in New York, the canvassers *shall complete* the canvass on the day subsequent to the closing of the poll. If they do not, the election is not thereby affected. (*Ex parte Heath*, 3 Hill, 46-7.)

In *Arnold v. Lea*, a case arising in Tennessee, reported in *Clark's Contested Elections in Congress*, 601, the statute provided: "Balls to be placed in a box, which shall be locked or well secured." In that case a large *gourd* was used instead of a box; the variance was held not to invalidate the election.

The same case decides that the inspectors of a particular precinct, not having been sworn as directed by the law, did not vitiate the election; nor where a justice being an inspector swears himself, and in *Strong*, petition, etc., 20 Pickering, 491-2, the general rule is laid down broadly that an illegal act on the part of the canvasser shall not affect the result; they shall be punished if they act corruptly, but the election shall stand good.

The undersigned recommend the passage of the following resolution:

Resolved, That the prayer of the petitioner ought not to be granted.

Respectfully submitted,

CHAS. G. MYERS,

WM. SIDNEY SMITH.

On motion of Mr. Myers,

Resolved, That the said report and resolution be laid on the table, and that it be printed in connection with the report of the majority of the committee, for the use of the Legislature.

Assembly Journal, 1848, page 865.

REPORT OF MAJORITY ADOPTED — MORGAN JOHNSON AWARDED
THE SEAT.

IN ASSEMBLY, *April 1*, 1848.

The House then proceeded to the consideration of the resolutions heretofore reported by the committee on privileges and elections, in the words following, to wit:

Resolved, That Solomon Moss is not entitled to the seat as member of Assembly now occupied by him.

Resolved, That Morgan Johnson is entitled to the seat as member of Assembly now occupied by Solomon Moss.

Debate was had thereon, when Mr. Speaker put the question whether the House would agree to the said first resolution, and it was determined in the affirmative.

Ayes, 72. Nays, 28.

Mr. Speaker then put the question whether the House would agree to the said last mentioned resolution, and it was determined in the affirmative.

Ayes, 73. Nays, 27.

MR. JOHNSON SWORN IN.

Morgan Johnson, the said member of Assembly elect from the second Assembly district, county of Niagara, then appeared at the chair of the Speaker and took and subscribed the oath of office prescribed by the Constitution of this State.

Assembly Journal, 1848, pages 1027, 1028, 1029.

AN ACT PROVIDING FOR PAYMENT OF EXPENSES OF MOSS AND JOHNSON IN CONTESTING SEAT.

IN ASSEMBLY, *April 3, 1848.*

Mr. Raymond, from the committee on the judiciary, asked for and obtained leave to bring in a bill entitled "An act to provide for paying certain expenses to Solomon Moss for defending, and Morgan Johnson for contesting the right to seat as a member of this House," which was read the first time.

On motion of Mr. Raymond,

Ordered, That the said bill be committed to the committee of the whole House when on the engrossed bill from the Senate making appropriations to the State Library.

Assembly Journal, 1848, page 1031. See, also, Assembly Journal, 1848, pages 1039, 1042, 1076, 1340, 1365.

Case of Daniel T. Durland and Daniel Fullerton.

ORANGE COUNTY — OBJECTIONS TO DANIEL FULLERTON BEING SWORN.

IN ASSEMBLY, *January 1, 1850.*

Hon. Christopher Morgan, Secretary of State, was in attendance to administer the oath of office to the members of Assembly.

When the name of Daniel Fullerton of the third Assembly district of the county of Orange, was called, Mr. Ford rose and objected to his being sworn in as a member at this time, upon the ground that his right to a seat was contested by Mr. Durland, and moved that his name be passed over until the remaining members were sworn.

Debate was had when Mr. Fullerton rose, and after stating that he appeared here with a certificate from the board of county canvassers, of the county of Orange, declaring him to be duly elected a member of the House; that he claimed to have been fairly, legally

and equitably chosen, and was prepared to establish his claim by proof to the satisfaction of the House, yet not desiring to cause any delay or embarrassment in the organization of the House, it was his design to decline to vote or take any part in the election of officers of the House.

Thereupon, Mr. Ford withdrew his motion, and Mr. Fullerton was duly qualified as a member.

Assembly Journal, 1850, page 7.

PETITION OF DANIEL T. DURLAND, PRESENTED, CLAIMING SEAT.

IN ASSEMBLY, *January 7, 1850.*

Mr. Ford presented the petition of Daniel P. Durland of the county of Orange, claiming a seat as a member of this House, which was read and referred to the committee on privileges and elections.

Assembly Journal, 1850, page 53.

COMMITTEE AUTHORIZED TO TAKE TESTIMONY AND TO SEND FOR PERSONS AND PAPERS.

IN ASSEMBLY, *January 14, 1850.*

Mr. Dinning, from the committee on privileges and elections, to which was referred the petition of Mr. Durland, claiming the right to a seat in this House, offered for the consideration of the House a resolution in the words following, to wit:

Resolved, That the committee on privileges and elections be and the same is hereby authorized to send for such persons and papers as may be necessary to aid said committee in the investigation of the claim made by Mr. Durland to the seat now held by Mr. Fullerton, from the third Assembly district in the county of Orange, and that the chairman and secretary of said committee be and they are hereby authorized to go to the county of Orange and take testimony in relation to said claim, if the committee shall deem it necessary to do so.

Mr. Speaker put the question whether the House would agree to the said resolution, and it was determined in the affirmative.

Assembly Journal, 1850, page 114.

IN ASSEMBLY, *February 8, 1850.*

Mr. Ford offered for the consideration of the House a resolution in the words following, to wit:

Resolved, That the committee on elections be requested to report in the case of the contested seat of Mr. Fullerton forthwith.

Ordered, That the said resolution be laid on the table.

Assembly Journal, 1850, page 316.

REPORT OF COMMITTEE ON PRIVILEGES AND ELECTIONS.

IN ASSEMBLY, *February 13, 1850.*

Mr. Dinning, from the committee on privileges and elections, to which was referred the petition of Daniel T. Durland, claiming the seat occupied by Daniel Fullerton on the floor of this House, reported as follows, to wit:

REPORT OF THE COMMITTEE ON PRIVILEGES AND ELECTIONS ON THE PETITION OF DANIEL T. DURLAND, CLAIMING A SEAT AS MEMBER OF ASSEMBLY FROM THE THIRD ASSEMBLY DISTRICT OF THE COUNTY OF ORANGE.

The committee on privileges and elections, to which was referred the petition of Daniel T. Durland, claiming a seat in the Assembly as member from the third Assembly district of the county of Orange, now held by Daniel Fullerton, report:

That the parties have appeared before your committee in person and by their respective counsel. That the petition in substance alleges that the said Daniel T. Durland received the greatest number of votes cast for member of Assembly at the last general election in the third Assembly district of the county of Orange, but that the board of county canvassers illegally and improperly rejected the

return made by the inspectors of election for the third election district of the town of Minisink, and certified that Daniel Fullerton had been duly elected such member.

In support of the petition, Mr. Durland produced in evidence before your committee certified copies of the return of the county canvassers of the county of Orange, and of the return of the inspectors of election for the third election district of the town of Minisink, which are hereto annexed, and marked Exhibits A and B, respectively.

It was then admitted by Mr. Fullerton that the certificate of election, as given to him by the board of county canvassers, shows that he received a majority of ninety-six votes, and that the board of county canvassers rejected the returns from the said third election district of the town of Minisink, in which Mr. Durland received one hundred and sixty-two votes and Mr. Fullerton fifty-nine votes. And further, that if the return last mentioned had been received and allowed by the board of county canvassers, Mr. Durland would have received a majority of seven votes in the third Assembly district of the county of Orange.

Mr. Fullerton then submitted the following answer to the petition, viz.:

IN THE MATTER OF THE CONTESTED ELECTION OF DANIEL FULLERTON AS A MEMBER OF ASSEMBLY.

I shall insist, in support of my right to the seat now held by me in the Assembly, upon the following points:

I. That the certificate of the county canvassers is conclusive upon the question of my right to a seat, unless it shall be made to appear that the said board of canvassers were guilty of fraud or corruption in giving such certificate.

II. If it shall be held that the House can properly look beyond or behind such certificate, that I will insist that the returns of the inspectors of the third election district of the town of Minisink were legally and properly rejected by the board of county canvassers; and if it shall be found that the county canvassers did legally and

properly reject said returns that that is conclusive upon the question.

III. If it shall be held that the House can look beyond this decision and the ground upon which it was made, then I shall insist that the returns of said third election district were and should be rejected upon the following grounds:

1st. Because the poll of said election in said district was held open after sunset of the day of election, and votes were irregularly received by the inspectors of said district after sunset.

2d. Because the votes of the said district were illegally canvassed; persons, not being inspectors of said election district, being permitted to canvass, and to assist to canvass, a portion of the votes cast at the said election in said district.

IV. I shall insist that more than seven illegal votes were given for Mr. Durland in the said third Assembly district of the county of Orange.

V. I shall insist that two or more votes, cast for me in the first election district of the town of Minisink, were, by mistake of the inspectors, put in the wrong box, and were destroyed, and not allowed as canvassed to me in said district; and that two votes, cast for me in said district, were illegally drawn from the ballot-box, and destroyed before the canvass of said votes, and that they were not canvassed or allowed to me by the said inspectors.

Lastly, I shall insist that I received a majority of the legal votes cast in the third Assembly district of the county of Orange.

The effect of the first point taken by Mr. Fullerton, if sustained, would be to divest this House of the jurisdiction over the "election returns and qualifications of its own members," expressly conferred upon it by the Constitution, and to transfer it to a local board whose functions are solely of a ministerial character, and your committee had no hesitation in pronouncing it untenable.

The second point, claiming that the returns from the third election district of Minisink were legally and properly rejected by the county canvassers, evidently refers to matters appearing on the face of the return, and was so presented to your committee.

The only defects pointed out on the face of the returns are stated in the supplementary certificates of the inspectors indorsed upon the return:

1. That the State and judiciary tickets attached were not the regular tickets voted at the election, but were attached through mistake.

2. That one of the Assembly ballots is wanting.

It was undoubtedly the duty of the inspectors to attach such ballots as were voted, but your committee have no doubt that the statute is in that respect directory only, and that the omission to comply with it constitutes one of that class of irregularities which do not affect the merits and never vitiate a whole proceeding. It could not be endured that a mere clerical error should in effect disfranchise a whole district.

In regard to the fourth allegation of Mr. Fullerton, viz.: That more than seven illegal votes were given in the said district for Mr. Durland in the said district, it was objected on the part of Mr. Durland:

1. That it was not competent for the committee, under the precedents established by this House, to take testimony as to any matter back of the ballot-box.

2. That the allegation was defective in not specifying the names of the votes charged to have been illegal.

It cannot be denied that the practice of this House in all the recent cases is unfavorable to going behind the ballot-box but actuated by a desire to avoid all cause or occasion of complaint from any quarter, your committee preferred to adopt the rule which prevails in Congress, and permit such evidence to be taken by both parties, upon condition that lists of the votes charged to be illegal should be served a reasonable time before the taking of the testimony.

On the 14th of January, a resolution was passed by the House giving power to the committee to send for persons and papers, and authorizing the chairman and secretary of the committee to proceed to the county of Orange to take testimony.

The committee appointed Friday, the 25th of January, for the taking of such testimony at Port Jervis, and directed that Mr. Fullerton serve on Mr. Durland a list of the voters claimed by him to have voted illegally, by Monday, the 21st; and that a like notice be given by Mr. Durland, if he should wish to introduce similar testimony.

The taking of testimony was adjourned over, and not proceeded in until the 31st of January, when Mr. Fullerton offered to produce evidence of illegal voting. It appearing, however, that the notice directed by the committee had not been given, and objections having been taken on that ground, he was not allowed to produce it.

The chairman and secretary only being present, did not think proper to make any new order without the concurrence of the other members of the committee, and laid the matter over until their return to Albany, and proceeded to take the evidence to the other points in the case. The depositions containing said evidence, are hereto annexed. On the 7th instant, a meeting of the committee was held, at which Mr. Fullerton attended, and after some informal conversation, it was adjourned until the following day, to enable Mr. Fullerton to make an application in proper form.

At the adjourned meeting, Mr. Fullerton presented the written request, which is hereto annexed, but it appearing that the notice had not yet been served upon Mr. Durland, and no affidavits having been submitted to excuse the delay, your committee felt it to be their duty to deny the request, and to report to the House upon the testimony already taken.

This testimony was confined to three points, viz.:

1. The keeping of the poll open after sunset in the 3d district of Minisink.
2. The alleged canvassing of votes in that district by unauthorized persons.
3. The omission to allow Mr. Fullerton certain votes said to have been given for him in the first election district of Minisink.

One witness was examined in relation to a removal of ballot-boxes in the third district of Minisink during the canvass, but the

point was not taken in the allegations, and the testimony elicited is unimportant. The deposition is annexed.

In regard to the keeping of the poll open after sunset, your committee would, in the first place, remark, that the statute does not require that the poll should be closed at sunset, but only that it should be kept open until then. It follows, therefore, that if exception can be taken at all to the keeping of the poll open to a later hour (which your committee very much doubt), that it cannot be taken without showing some act on the part of the authorities by which voters were in fact misled and prevented from casting their votes while the opportunity was corruptly afforded to others.

No such evidence has been produced. It appears that the room in which the poll was held was badly lighted, and faced the east, and that the day was dark and rainy. Only one witness, John Whiting, believes that it was kept open after sunset. The other witnesses are confident it was closed about sunset. Samuel Slawson, one of the clerks of the poll, who was examined on the part of Mr. Fullerton, says that it closed not far from five o'clock, and that there were two or three timepieces at the board which differed. It is stated by some of the witnesses, and contradicted by none, that Isaac P. King was the last who voted, and that he voted from ten to twenty minutes before the poll closed; and Mr. King, in his deposition, states his belief that when he voted the sun was fifteen or twenty minutes high.

In regard to the canvassing of votes by unauthorized persons, the testimony is more conflicting.

It appears that the canvass was conducted in the following manner: When the tickets were emptied from the ballot-box they were divided into three parcels. Each inspector counted one parcel without opening it, and the sum of these counts was compared with the poll lists.

Each inspector then opened the tickets before him, separated those given for the different candidates, counted and gave in his

count to the clerks without having it revised by any other inspector.

Mr. Whiting, one of the inspectors, is said to have been assisted by Mr. Stewart T. Durland, a brother of the contestant; and two of the witnesses produced by Mr. Fullerton, B. Myers and S. T. Bodle, swear very positively that a part of the tickets which fell to Mr. Whiting's share were counted by Durland only, and the number given to the clerks from his count.

Stephen Moore, another witness produced on the same side, at first testified to the same effect, but afterward said that he could not tell whether Mr. Whiting counted after Durland or not; he did not remember about it, and also expressed the opinion that the tickets which Durland counted had been opened by Mr. Whiting before Durland's arrival.

Mr. Smith, one of the other inspectors, saw Durland counting, but could not say whether the same tickets were counted by Whiting previously or not, but he thinks they had been.

Mr. Seybolt, the remaining inspector, and Mr. Slawson, one of the clerks, were also examined on the part of Mr. Fullerton, but were unable to say anything in relation to the matter, and were not cross-examined.

On the other side Mr. Durland produced John Whiting, the inspector; Stewart T. Durland and Lewis Armstrong, the other clerk of the poll, who unite in saying that the tickets were all counted by Mr. Whiting, as well as by Mr. Durland. The tickets which fell to Mr. Whiting's share were counted in several distinct parcels (or bunches as some of the witnesses term them), and in relation to one of these parcels, Mr. Whiting states that after counting it, he felt confident that he had made a mistake of one in his count, and handed the tickets to Durland with a request to count them over, and on his doing so and finding that Whiting had made the mistake which he suspected, the latter did not again count them, but gave in the number so found to the clerks.

These witnesses also mention that Mr. Stewart Durland in his count, found a ticket from which Mr. Daniel T. Durland's name

had been erased with a led pencil, and the name of Gideon W. Coch inserted, and which had been previously counted for Daniel T. Durland. This is also corroborated by the testimony of one of Mr. Fullerton's witnesses, Bodle, who remembered the ticket, although unable to say who found it.

So far as the number of witnesses is concerned, the preponderance of testimony is undoubtedly upon the side of Mr. Durland. It may, indeed, be objected that this preponderance is in part created by the testimony of the inspector who is charged with the official delinquency, and of him who is charged to have aided him in his misconduct; but on the other hand, not only are all the witnesses unimpeached, but they have all, with the exception of Mr. Stewart T. Durland, been called as witnesses on the part of Mr. Fullerton, and cannot therefore be deemed capable of an attempt to escape censure by willful perjury.

The inspectors appear to have been unskilled in their duty, but your committee see no reason to doubt their intention to perform that duty, or the fact that it was substantially performed. No attempt was made to prove that there was any actual error or fraud in the account, and the detection and announcement by Mr. Stewart Durland of an error which had been made in favor of the party who may be reasonably supposed to have enlisted all his sympathies, is strong incidental evidence of good faith in the transaction.

Your committee think that a charge which could nullify the votes of a whole district should be most clearly and uncontestably proven, and they feel it due to the officers attacked and the witnesses examined, to give a preference to that testimony which is affirmative in its character over that which is negative merely, and to adopt the conclusion which comports best with the integrity of all.

With such views, your committee feel bound to declare the allegation in respect to the canvass of votes by unauthorized persons not proven.

The testimony adduced to the remaining point proves that two ballots, having on them the name of Daniel Fullerton, were found in boxes other than the Assembly box at the poll held in the first

election district of the town of Minisink, and were not allowed to Mr. Fullerton. Ananias M. Carter and James Post were examined to prove that they both voted for Mr. Fullerton at that election, as member of Assembly, and they both testified to their intention so to vote, and their belief that they did so vote.

Mr. Carter declined however to say positively that he handed his vote to the inspector, and Post stated that he took the tickets from a man that he knew to be a whig, and did not examine them before voting.

The poll list was then produced, from which it appeared that neither of the last named witnesses was recorded as voting for the Assembly, and that five other persons were also recorded as having voted other tickets, but not the Assembly ticket.

It was also proved that there was an excess of one ticket in the Assembly box in that district over the number shown by the poll list, and that a ticket in favor of Charles Durland was destroyed to remove that excess.

The above is believed by your committee to be a fair statement of the facts of this case, and unless your honorable body should deem proper to order the taking of testimony in regard to illegal voting, your committee recommend the adoption of the following resolution:

Resolved, That Daniel Fullerton is not entitled to a seat in this Assembly.

Resolved, That Daniel T. Durland is entitled to a seat in this Assembly, as a member from the third Assembly district, of the county of Orange, and that he be admitted and sworn as such.

F. C. DININNY.
GEO. G. WATERS.
JAS. MONROE.
R. McINTOSH.
C. ROBINSON.

Assembly Documents, 1850, vol. 1, No. 67; see do. for petition, documents, testimony, etc., pages 11 to 53.

FIVE TIMES THE USUAL NUMBER OF THE REPORT ORDERED
PRINTED.

Mr. Ford offered for the consideration of the House a resolution in the words following, to wit:

Resolved, That five times the usual number of the report on elections, in relation to the contested seat in Orange county, and the evidence presented to and taken by them be printed for the use of the House, and in the meantime that the report lay upon the table.

Mr. Speaker put the question whether the House would agree to so much thereof as relates to printing, and it was determined in the affirmative.

Mr. Speaker then put the question whether the House would agree to so much thereof as relates to laying upon the table, and it was determined in the affirmative.

Assembly Journal, 1850, page 355.

BOOKS, STATIONERY, ETC., FURNISHED MR. DURLAND.

On motion of Mr. Fiske,

Resolved, That Mr. Durland be supplied with the same number of newspapers as are furnished to members of this House, also books, documents, knife, stationery, etc., to be paid for in the same manner, and all books and all other articles furnished members.

Assembly Journal, 1850, page 386.

REPORT OF COMMITTEE TAKEN UP AND CONSIDERED, AND MOTION
MADE TO RECOMMIT TO COMMITTEE.

IN ASSEMBLY, *February* 26, 1850.

Mr. Burroughs moved that the special order before the House be postponed until to-morrow at 12 o'clock M., for the purpose of taking up for consideration at this time the report and resolutions of the committee on privileges and elections, in relation to the claim of Daniel T. Durland to the seat occupied by Daniel Fullerton, from the third district of the county of Orange.

Mr. Speaker put the question whether the House would agree

to the said motion of Mr. Burroughs, and it was determined in the affirmative.

Mr. L. Ward Smith offered for the consideration of the House a resolution in the words following, to wit:

Resolved, That the report and resolutions of the standing committee on privileges and elections, on the contested seat between Mr. Durland and Mr. Fullerton, be recommitted with instructions to take testimony in relation to the illegal votes alleged to have been given at said election.

Assembly Journal, 1850, page 472.

CONSIDERATION POSTPONED UNTIL FOUR O'CLOCK.

Mr. Speaker announced the question to be on Mr. L. Ward Smith's resolution to recommit the report and resolutions of the committee on privileges and elections, with instructions to take testimony as to illegal voting in the case of the contested election in the third district of the county of Orange.

The Speaker put the question whether the House would agree to the said resolution, and it was determined in the negative.

Ayes, 44. Noes, 50.

Mr. Pruyn moved that the House do now adjourn.

Mr. Speaker put the question, and it was determined in the negative.

Ayes, 43. Noes, 50.

Mr. Lyon called for the previous question.

Mr. McLean moved that the motion for the previous question be laid upon the table.

Mr. Speaker put the question, and it was determined in the negative.

Ayes, 44. Noes, 50.

Mr. Wakeman moved that the House do now adjourn.

Mr. Speaker put the question, and it was determined in the negative.

Ayes, 42. Noes, 50.

REPORT OF COMMITTEE ADOPTED — MR. DURLAND AWARDED SEAT AND SWORN IN.

After efforts to adjourn, etc., Mr. Speaker announced the main question to be on the adoption of the resolutions reported by the committee on privileges and elections, which are as follows:

Resolved, That Daniel Fullerton is not entitled to a seat in this Assembly.

Resolved, That Daniel T. Durland is entitled to a seat in this Assembly as a member from the third district from the county of Orange, and that he be admitted and sworn as such.

Mr. Speaker put the question whether the House would agree to the said resolutions.

The Clerk having gone through with the roll, proceeded to call the absentees, and on calling the name of Mr. Waters, he arose and asked to be excused, giving his reasons therefor.

Mr. Speaker put the question whether the House would agree to excuse Mr. Waters, and it was determined in the affirmative.

The Clerk having concluded the call of absentees, the vote on the said resolution was determined in the affirmative.

Ayes, 50. Noes, 38.

Mr. Ford moved that the vote just taken on said resolutions be reconsidered, and moved the previous question thereon.

Mr. Wakeman moved to lay the said motion of Mr. Ford on the table.

Mr. Speaker put the question whether the House would agree to the said motion of Mr. Wakeman, and it was determined in the negative.

Mr. Speaker put the question whether the House would agree to second the call for the previous question, and it was determined in the affirmative.

Mr. Speaker then put the question, "Shall the main question be now put?" and it was determined in the affirmative.

Mr. Speaker then announced the main question to be on Mr. Ford's motion to reconsider.

Mr. Speaker then put the main question, it being whether the House would agree to the said motion of Mr. Ford, and it was determined in the negative.

Mr. Daniel T. Durland then came forward and was duly sworn in by the Speaker as a member of this House from the third Assembly district of the county of Orange.

Assembly Journal, 1850, pages 470 to 481, both inclusive. See also pages 483, 484.

An act to pay certain expenses of Daniel Fullerton and Daniel T. Durland.

Assembly Journal, 1850, pages 655 to 1359.

Case of Samuel Jayne, Jr., and John Underwood.

YATES COUNTY — PETITION PRESENTED.

IN ASSEMBLY, *January* 18, 1851.

Mr. J. Benedict presented the petition of John Underwood for a seat as a member of this House for the county of Yates, which was read and referred to the committee on privileges and elections.

Assembly Journal, 1851, vol. 1, pages 117, 118.

RESOLUTION ALLOWING JOHN UNDERWOOD A SEAT PENDING INVESTIGATION.

IN ASSEMBLY, *January* 28, 1851.

Mr. Bishop offered for the consideration of the House a resolution, in the words following, to wit:

Resolved, That John Underwood be admitted to a seat in this House, pending his application for a seat in the place of Samuel Jayne, Jr., from Yates county, but that the said Underwood shall

not be allowed to vote, or take any part in the proceedings of this House, and that the clerk of the House furnish him with stationery, newspapers, etc., the same as allowed to the members of this House.

Debate being had thereon,

Ordered, That said resolution be laid upon the table.

Assembly Journal, 1851, vol. 1, page 209.

IN ASSEMBLY, *January 29, 1851.*

On motion of Mr. Bishop, the House proceeded to the consideration of the resolution heretofore offered by him, in the words following, to wit:

Resolved, That John Underwood be admitted to a seat in this House, pending his application for a seat in the place of Samuel Jayne, Jr., from Yates county, but that the said Underwood shall not be allowed to vote, or to take any part in the proceedings of this House, and that the clerk of the House furnish him with stationery, newspapers, etc., the same as allowed to the members of this House.

Mr. Speaker put the question whether the House would agree to said resolution, and it was determined in the affirmative.

Assembly Journal, 1851, vol. 1, page 217.

REPORT OF COMMITTEE PRESENTED.

IN ASSEMBLY, *February 1, 1851.*

Mr. Bishop, from the committee on privileges and elections, to which was referred the petition of John Underwood, for a seat in this House in the place of Samuel Jayne, Jr., presented a report, upon which Mr. J. Benedict offered the following resolution, to wit:

Resolved, That the chairman of the committee on privileges and elections, together with Mr. Maurice, one of the associate members of said committee, be authorized to repair to Yates county for the purpose of taking further testimony in the case of John Under-

wood, who is contesting a seat in this House, and that he be authorized to employ a clerk and such other persons as may be necessary to procure said testimony.

Mr. Maurice offered the following amendment, which was accepted by Mr. J. Benedict, to wit:

Resolved, That the committee on privileges and elections be instructed to report in writing the facts in relation to the claim on the part of John Underwood to the seat in this House now held by Mr. Jayne.

Mr. Speaker put the question whether the House would agree to the said resolution, and it was determined in the affirmative.

Assembly Journal, 1851, vol. 1, pages 247, 248.

REPORT OF MAJORITY OF COMMITTEE.

IN ASSEMBLY, *February 13, 1851.*

Mr. J. Benedict, in behalf of the majority of the committee on privileges and elections, to which was referred the petition of John Underwood for a seat in this House in the place of Samuel Jayne, Jr., reported as follows, to wit:

REPORT OF THE MAJORITY OF THE COMMITTEE ON PRIVILEGES AND ELECTIONS, ON THE CLAIM OF MR. UNDERWOOD TO THE SEAT NOW OCCUPIED BY MR. JAYNE.

The majority of the committee on privileges and elections, to which was referred the petition of John Underwood, claiming that he is entitled to the seat now occupied by Samuel Jayne, of Yates county, beg leave to report the proceedings had before your committee in the premises:

That at a meeting of said committee Mr. Underwood and Mr. Jayne attended, and that Mr. Underwood was instructed by said committee to make out and serve upon the committee and Mr. Jayne his allegation, which if substantiated by proof, would entitle him to the seat; and Mr. Jayne was also instructed by said commit-

tee to answer the same. That in pursuance of such instruction, Mr. Underwood made out and served, as directed, a paper, of which the following is a copy to wit:

“To SAMUEL JAYNE, Jr., Esq.:

“*Sir*.—Please take notice, that I claim the seat in the Assembly which you now occupy, on the ground that there were about fifty-five votes, called Democratic votes, cast in the second district, in the town of Jerusalem, in said county of Yates, for myself for member of Assembly in said county, that were not counted or allowed for me, and which, if allowed, elects me as a member from said county instead of yourself.

“Yours, etc.,

Marked A.

“JOHN UNDERWOOD.”

Dated, *January 23, 1851.*

That Mr. Jayne interposed the following answer, to wit:

“JOHN UNDERWOOD, Esq.:

“Take notice that the allegation set forth in the notice you have served on me, claiming my seat as member of Assembly, is not true.

Marked B.

“SAMUEL JAYNE, Jr.”

January 24, 1851.

That Mr. Underwood then presented to the committee, as evidence, the following paper, to wit: “Of State New York, Yates county, ss.: We the undersigned, of Jerusalem, in said county, being duly sworn, doth each for himself depose and say, that on the fifth day of November, 1850, in election district No. two in the town of Jerusalem, he voted for John Underwood for member of Assembly; and further says not. [Then follows the name of Chester O. Arnold and one hundred and fifty-three others. The conclusion of the paper is as follows:] I certify that each of the above-named persons signed the affidavit of which the above is a copy, and that I administered to each of them an oath in the usual form, to

wit: That each of the above-named persons voted on the fifth day of November, 1850, in election district No. 2, in the town of Jerusalem, for John Underwood for member of Assembly.

“NORMAN T. KIDDER,
“A Justice of the Peace in and for said county.””

Paper marked No. 1. The introduction of the foregoing paper was objected to by Mr. Jayne, but received by the committee for future consideration.

Mr. Underwood then offered in evidence the certificate of Robert Buel, a justice of the peace in and for said county of Yates, that he administered an oath to thirty-six persons (naming them), who testified that on the fifth day of November, 1850, they voted in the second election district of the town of Jerusalem for John Underwood for member of Assembly. This paper was marked No. 2.

Mr. Underwood also produced in evidence seven separate affidavits, taken before different justices of the peace, of seven different persons having voted in that election district of the town for him for member. These affidavits were marked number 3.

Mr. Underwood then introduced the affidavit of Andrew B. Angus and Daniel A. Thomas in relation to the canvass in said district of the town of Jerusalem. That Mr. Thomas, in his affidavit, testifies, that he was present at the canvass, saw the votes canvassed, and that Mr. Underwood, in that district, had forty-two majority over Mr. Jayne. This paper was marked number 4.

Your committee would here state, that according to the canvass made by the inspectors of said election district, Mr. Underwood had but one majority.

Mr. Underwood then introduced affidavits of Phineas Parker and others, showing that he could not procure, at the town clerk's office of said town of Jerusalem, the poll list, kept in the second election district of the town of Jerusalem. This paper was marked number 5.

Mr. Underwood also offered an affidavit of P. Parker, in relation to the vote of said town, which affidavit is marked number 6.

Mr. Underwood also introduced a poll list kept by one of the clerks of said election district, which is marked number 7.

Mr. Jayne then introduced his certificate of election, marked number 8. Also the certificate of inspectors of election, district number 2, in Jerusalem, marked number 9; and also the county canvassers' certificate of the county of Yates, marked number 10. All of which papers are herewith transmitted.

The committee beg leave to state, that they do not consider the evidence offered on the part of Mr. Underwood as conclusive as to his right to the seat in controversy. But believing that the case demands further investigation, and desirous of doing the parties justice in the matter, would respectfully recommend that a suitable person or persons of the committee be directed to proceed to Yates county and take such further evidence in the case as may be brought forward by the parties, as may be pertinent and proper to be received.

P. M. BISHOP,
JAMES ELY,
ABM. WELDEN.

Dated, *February 4*, 1851.

Assembly Documents, 1851, vol. 1, No. 55. See Documents accompanying same, following the report, pages 4-30.

Ordered, That said report be printed.

REPORT OF MINORITY.

Mr. Morris, from the minority of the committee on privileges and elections, reported as follows, to wit:

REPORT OF A MINORITY OF THE COMMITTEE ON PRIVILEGES AND ELECTIONS, ON THE PETITION OF JOHN UNDERWOOD, CLAIMING A SEAT AS MEMBER OF ASSEMBLY FROM THE COUNTY OF YATES.

The undersigned, a minority of the committee on privileges and elections, to which was referred the petition of John Underwood, claiming a seat in the Assembly as member from Yates county, now

held by Samuel Jayne, Jr., report that the parties have personally attended before your committee. That the petition in substance alleges that the petitioner, John Underwood, received the greatest number of votes cast for member of Assembly at the last general election in the county of Yates, and that the inspectors in the second election district in the town of Jerusalem, made a mistake in the canvass of votes given in that district for member of Assembly. That the petitioner received about one hundred and ninety-nine votes, but only one hundred and seventy-nine votes were counted for him, and that Samuel Jayne, Jr., received one hundred and fifty-eight votes, but that one hundred and seventy-eight votes were counted for him.

At the meeting of your committee held on the twenty-third day of January, 1850, it was suggested to both parties, and not being objected to by either of them, the committee directed that the petitioner should set forth in writing, a statement of the grounds on which he claimed to be entitled to the seat in question, and serve a copy thereof on the sitting member, who should answer the same also in writing, and serve a copy of his answer on the petitioner; and adjourned until the next day to give the parties an opportunity to comply with the direction of the committee.

At the next session of the committee, held on the twenty-fourth day of January, 1851, both parties again personally attended and the statement and answer required by the order of the committee were presented. On examining the statement of the petitioner, it appeared that he totally changed the ground on which he claimed his right to the seat in question, as set forth in his petition, and alleged in substance that about fifty-five democratic votes were given for him as member of Assembly, in election district No. 2, town of Jerusalem, which were not counted or allowed for him by the inspectors. The sitting member explicitly denied the truth of this allegation. The committee adjourned to January 30, 1851, without taking any further action in the matter.

On the adjourned day, both parties personally attended before

your committee; Mr. Thompson one of the undersigned, being unavoidably absent.

The petitioner offered certain papers for the consideration of the committee, marked respectively No. 1, No. 2, No. 3, No. 4, No. 5, No. 6 and No. 7, the introduction of which was objected to by Mr. Jayne. The committee overruled the objection, and the papers were admitted by Mr. Maurice, one of the undersigned, dissenting.

The following is a correct description of these papers:

No. 1 is a paper without any date, and all in the same handwriting except the signature, "Almon S. Kidder, a justice of peace in and for said county," which is apparently in a different hand. The caption of this paper is in these words, viz.: "State of New York, Yates county, ss.: We, the undersigned, of Jerusalem, in said county, being duly sworn, doth each for himself depose and say, that on the fifth day of November, 1850, in election district No. 2, in the town of Jerusalem, he voted for John Underwood, for member of Assembly, and further says not. [Then follows a long list of names, in all, one hundred and fifty-four and the paper proceeds:] I certify that each of the above-named persons signed the affidavit of which the above is a copy, and that I administered to each of them an oath in the usual form, to wit, that each of the above-named persons voted on the fifth (5) day of November, 1850, in election district No. 2, in the town of Jerusalem, for John Underwood for member of Assembly. Signed, 'Almon S. Kidder, a justice of peace in and for said county.'"

No. 2 is a paper also without date, all written apparently by the same person and in these words: "State of New York, county of Yates, ss.: I certify that I administered an oath in the usual form to each of the following named persons, to wit: [here follows thirty-six names], and that each swore that he voted at the last general election held on the 5th day of November, 1850, in election district No. 2, in the town of Jerusalem, in said county, for John Underwood for member of Assembly. Robert Buel, justice of the peace in and for Yates county."

No. 3 consists of five separate papers pinned together.

The first is an affidavit of Moses Shaw, an illiterate person unable to write his name, and who signs with an X, taken before J. Hewitt, a justice of the peace of Chemung county, on the 9th of January, 1851, who says, that at the last election he resided in district No. 2, in Jerusalem, and cast his ballot for John Underwood for member of Assembly from Yates county. There is no certificate by the justice that he read over or made known the contents of this affidavit to the person making it.

The second is an affidavit of Oliver Babcock, as written in the body of the affidavit, or Babcock as written in the signature, also an illiterate marksman, taken before Andrew De Groff, a justice of the peace for Steuben county, on 15th January, 1851, who says that he resided in the town of Jerusalem, Yates county, in district No. 2, and that at the last annual election held in said county for State and county officers, he cast his ballot for John Underwood, for member of Assembly, in and for said county. There is no certificate by the justice that he read over or made known the contents of this affidavit to the person making it.

The third is an affidavit of Jared Cahoun, taken before John P. Livermore, a justice of Allegany county, on the 4th January, 1851, who says that he is a resident of the town of Jerusalem, in the county of Yates; was there at the election held in said town of Jerusalem in November last, and that he gave his vote at said election, for John Underwood for member of Assembly for said county, *in district No. 2, Jerusalem*, the words in italics being written in a different hand from that of the justice or the person signing the affidavit.

The fourth is an affidavit of Lewellyn S. Weaver, taken before A. W. Loop, a justice of the peace for Tioga county (in the commonwealth of Pennsylvania), on the 10th January, 1851, who says that at the last annual election holden for State officers, he resided in the town of Jerusalem, district No. 2, Yates county, New York, and that at such election he cast his ballot for John Underwood for member of Assembly for said county.

The fifth is an affidavit of Casper Hibbard, William Van Dusen and Sylvester Pierce, taken in Steuben county, before a justice of the peace, whose name the undersigned are unable to decipher, on the 11th January, 1851, to the effect that at the last annual election for State and county officers, held in and for the State of New York, they were voters in election district No. 2, town of Jerusalem, that each of them, at that election, voted for member of Assembly, and they each cast their vote for John Underwood for member of Assembly, in district No. 2, in Jerusalem.

No. 4 consists of three separate papers pinned together.

The first is an affidavit of Andrew B. Angus, taken before Samuel L. Millsbaugh, a justice of the peace for Yates county, on the 18th January, 1851, who says that he was poll clerk of election district No. 2, in the town of Jerusalem in said county at the general election held therein, on the fifth day of November, 1850, that he saw the votes which were cast at the said election counted and canvassed; that the name of Samuel Jayne, Jr., the democratic candidate for member of Assembly, was erased from several ballots and no other name substituted therefor, and that, according to the best of his recollection, knowledge and belief, the number of ballots from which the said Jayne's name was erased, and no other name substituted therefor was four or five.

The second is an affidavit of David A. Thomas, taken before Almon S. Kidder, justice of the peace of Yates county, on the 20th January, 1851, who says that he attended the polls in election district No. 2, in the town of Jerusalem, on the 5th day of November, 1850; that he went there for the purpose of obtaining the election news, to carry the same to Penn Yan; that he kept a count of the votes as they were counted out of the ballot-box; that John Underwood had fifty-five split tickets for member of Assembly, that is to say, John Underwood received fifty-five democratic votes for member of Assembly, from which the name of Samuel Jayne, Jr., for the same office, had been erased, or otherwise obliterated, or had been altogether omitted; that the whole number of whig ballots from which the name of John Underwood was

erased, or in any way obliterated, that he saw, was five; that he estimated the votes thus kept by him, and found that John Underwood had received, in said district, forty-two majority over said Jayne for said office, whereupon the deponent left with the said news and carried the same to his democratic friend in Penn Yan, and did so report on his arrival in Penn Yan.

The third is a paper in these words: "Branchport, Yates county, N. Y., January 11, 1851. I, Phineas Parker, one of the inspectors of election in election district No. 2, in the town of Jerusalem, in the county of Yates, do hereby certify that I acted as one of the board of inspectors at the last election in said district, and that I am well satisfied, after a careful examination, that the said board made a mistake in the canvass, against John Underwood, in said district, at said election.

P. PARKER."

No. 5 consists of two affidavits, attached together by wafers.

The first is an affidavit of Phineas Parker, Harrison H. Gage and Rodney L. Adams, taken before Samuel S. Millspaugh, a justice of the peace for the county of Yates, on the 18th of February (so it is written), 1851, to the effect that on the 18th of January, 1851, they called on Franklin Ellsworth, town clerk of Jerusalem, and requested of him a certified copy of the poll list of election district No. 2, in Jerusalem, for the election held there on the 5th November, 1850; that Ellsworth said he had not a copy of the poll list in his possession and could not furnish a copy; and further, that he did not remember to have had the said poll list in his possession at any time.

The second is an affidavit of Myron H. Weaver and Phineas Parker, taken before the said Samuel S. Millspaugh, on the 18th of January, 1851, to the effect that each had seen a copy of the poll list of the persons who voted in election district No. 2, in the town of Jerusalem, Yates county, on the 5th November, 1850, in the possession of Franklin Ellsworth, town clerk of said town, in the clerk's office, since the general election held in said district on the 5th day of November aforesaid.

No. 6 is an affidavit of the said Phineas Parker, taken before the said Samuel S. Millspaugh, on the 21st January, 1851, in which he says that he was one of the inspectors of election in election district No. 2, in the town of Jerusalem, Yates county, at the general election held there on the 5th November, 1850; that he assisted at the count and canvass of the votes at the said election, and that the whole number of whig votes from which the name of John Underwood was erased, or in any manner obliterated, for member of Assembly, was five and no more.

No. 7 is what purports to be the poll list of the general election held in election district No. 2, in the town of Jerusalem, in the county of Yates, November 5, 1850, to which is attached the affidavit of Andrew B. Angus, the poll clerk, who says that he kept it and that it is correct according to the best of his knowledge and belief; and another affidavit of Phineas Parker, the inspector, to the same effect.

No other papers were produced to the committee by the petitioner, nor did he ask leave to produce any, or request further time for that purpose.

The sitting member then offered in evidence on his part a certified copy, from the county clerk's office of Yates county, duly authenticated, of the statement of the canvass of the votes given at the general election in November, 1850, at the election district No. 2, in the town of Jerusalem, from which it appears that the whole number of votes given for the office of member of Assembly was three hundred and fifty-seven, of which Samuel Jayne, Jr., received one hundred and seventy-eight, and John Underwood received one hundred and seventy-nine. This statement is signed by all three of the inspectors of elections, and is in every respect conformable to the statute. Marked No. 9 by the committee.

Also, a certified copy, duly authenticated, of the statement of the board of county canvassers, in relation to member of Assembly, from which it appears that the whole number of votes given for member of Assembly, in said county, at the general election held

on the 5th November, 1850, was three thousand eight hundred and eighty-nine; of which Samuel Jayne, Jr., received one thousand nine hundred and sixty; John Underwood received one thousand nine hundred and twenty-eight, and Samuel Jayns, Jr., received one. Marked No. 10 by the committee.

And also, a certified copy, duly authenticated, of the certificate of the election of member of Assembly, signed by the chairman and clerk of the board of county supervisors, by which it appears that Samuel Jayne, Jr., was by the greatest number of votes duly elected member of Assembly in and for said county of Yates. Marked No. 8 by the committee.

The undersigned have been thus particular in their statement of the contents of these papers for the reason that they constitute the only evidence, and everything in the nature of or claimed to be evidence, submitted to them or for their consideration by either of the parties, and more especially because the chairman of their committee informs the undersigned that it is not his intention to annex the said paper to the majority report of the committee, or to submit them to this House.

Owing to the absence of Mr. Thompson, the committee, without determining what effect should be given to the papers, adjourned to the 31st January, 1851.

All the members of the committee being present at the adjourned day they proceeded to examine the papers produced by the petitioner. On such examination it appeared to the undersigned that all the papers offered by the petitioner, and marked from No. 1 to No. 7 inclusive, were inadmissible as evidence for any purpose. They are extra-judicial. No indictment for perjury could be found on them if any individual subscribing them swore falsely. The undersigned wish, however, to be distinctly understood that they do not express or mean to insinuate an opinion that the affidavits in question are false, but simply that being extra-judicial they are not, for this reason, entitled to credit as testimony. The paper marked No. 1 is merely equivalent to Mr. Kidder saying that (the persons named) told him that they voted for Mr. Underwood as member of

Assembly at the election in question; some of the other papers are more specific, but tend to no other result than that the individuals subscribing them assert that they voted for Mr. Underwood. In no point of view did they establish or make good the allegation contained in Mr. Underwood's statement, "that about fifty-five democratic votes were given for him and not counted by the inspectors." That they did not, whatever effect might be given to them, make out a *prima facie* case to show fraud, mistake or corruption, on the part of the inspectors of election district No. 2 in Jerusalem. Considered by themselves and without reference to the papers introduced by the sitting member, and so the undersigned submit they must be considered, it does not appear from them that any mistake prejudicial to the petitioner was made by the inspectors. It is true the certificate of Mr. Parker states that "he is well satisfied, after a careful examination, that the said board made a mistake in the canvass against John Underwood in said district at said election; but unless suspicion of fraud or corruption is cast on the proceedings of the inspectors, for aught that appears on these papers, that mistake, whatever it might have been, was instantly rectified by the inspectors themselves. If it were not, why did Mr. Parker sign the return? Every intendment and presumption is in favor of the good faith and legal correctness of the returns made by the inspectors. They are sworn officers. The canvass made by them is a public canvass within the view necessarily of numerous individuals. No one swears in any of the papers that votes given for Mr. Underwood were not counted for him. If such were the fact, the petitioner could easily have produced the affidavit of Mr. Parker; or Mr. Angus the clerk of the polls, or some other person to show it. He does not choose to get any such affidavit, and the inference, in the minds of the undersigned, is irresistible, that no mistake was in fact made. To assume that a mistake was made is to nullify the official return of inspectors given under oath, and this the undersigned are unwilling to do. They feel it due to the officers attacked, that a charge which would convict them of gross remissness of duty;

not to say criminality of conduct, should be most clearly and incontestably proven and not left to inference. The party claiming the allowance of votes in opposition to the return of the inspectors of the election, must show beyond all reasonable doubt his right to them, and that they were not allowed to him, by testimony positive and unequivocal. To adopt the language of a former committee of this House in a case involving some principles directly applicable to the present one, "he has no right to call upon the committee or this House to weigh or balance probabilities upon a question vitally affecting the elective franchise." And if he has no right to call on the undersigned to weigh probabilities he surely cannot require us to infer criminality, fraud or corruption on such loose, vague and unsatisfactory papers as those produced. Mr. Parker cannot be said to be an unwilling witness, for he has made for the petitioner no less than four affidavits and given to him one certificate. Yet not one of these affidavits, nor does this certificate, impute fraud or corruption to the inspectors. They stand before us unimpeached.

But another, and in the opinion of the undersigned, a conclusive objection against receiving or considering the papers offered by the petitioner, is because the statute (1 R. S., 3d ed., p. 166, § 12, etc.) distinctly points out the mode by which any person desiring to contest the election of any member of this House, may take such testimony as he chooses in support of his claim. This mode was not followed by the petitioner, but entirely disregarded. The undersigned do not express the opinion that the statute regulating the taking of testimony in election cases overrides, or was intended to override the constitutional right of this House to be the sole judge of the election, qualification and return of its members. On the contrary, the undersigned believe that it is competent for this House to order the investigation to be made in any proper way, either by the examination of witnesses in the presence of a committee or under a commissioner, but surely this House will require, while acting as a judge, and in the course of proceedings essentially judicial, that the ordinary rules of law applicable to evidence shall be observed.

Tested by those rules, these papers would be rejected in a controversy about a sixpence before a justice of the peace. And this House, in a question of such magnitude as the right of a member to his seat, and through him the right of his constituents to be represented in this House, will, the undersigned believe, require at least the appearance of something like evidence, before they will either dissent or disturb one of their regularly returned members in the discharge of his public duties.

Besides, the undersigned cannot see what possible bearing the papers marked No. 4, No. 5, and No. 6 can have on this question; with the exception of the certificate given by Mr. Parker, and already considered by the undersigned, they seem to be wholly irrelevant and immaterial.

Entertaining these views, one of the undersigned moved before the committee the following resolution:

Resolved, That this committee report to the House by writing, all the papers in our possession introduced by Mr. Underwood, the contestant, and Mr. Jayne, the sitting member; and that it is the opinion of the committee that the said contestant has wholly failed to establish, by legal evidence, his claim to said seat.

This resolution was amended, the chairman giving the casting vote, by striking out all after the word member. The mover of the resolution then added to it the following words: "and that the committee be discharged from further consideration of the subject." On the question being taken the resolution was negatived, the chairman giving the casting vote.

It is now proposed that this House order the chairman and one other member of this committee to proceed to Yates county, for the purpose of taking such testimony as the petitioner may see fit to produce to them. It would be perhaps sufficient to say on this subject, that the statute already referred to gives to the petitioner ample power to take all the testimony he wishes, without subjecting the State to the expense, or your committee to the inconvenience, of going to Yates county on such an errand.

But the great, and, in the opinion of the undersigned, the insurmountable objection to the further prosecution of this matter by your committee is, that the petitioner desires in effect, to substitute your committee in the place of the inspectors of election—the only persons who could act understandingly in the premises—and ascertain by testimony how men voted. Without having the ballots before us, we are expected to ascertain their contents, from the men who voted them, and thus grope to a conclusion adverse to the inspector's return, by the worst possible means, or by an arithmetical calculation. This, in the opinion of the undersigned, no previous committee on elections of this house ever yet did. And it is obvious that it opens the door to so much and such wholesale perjury that the undersigned think it never ought to be permitted in any case. Issues as numerous as the votes cast will be presented between each voter, on one side, and the three inspectors, also under oath, on the other. It seems to be too monstrous to be even considered. The undersigned have investigated all the cases occurring in this House, which the limited time allowed them enabled them to examine, and no such rule was permitted in any of them. On the contrary, they find this point to have been expressly, and, as they believe, correctly, decided by the committee on privileges and elections, on the petition of Abraham Aker, claiming the seat of George J. Barber. (See Ass. Doc. for 1845, vol. 1, No. 21.) Mr. Barber proved that an inhabitant of the town of Virgil voted for Barber by crossing Aker's name from a democratic ticket and inserting Barber's thereon, and that when the ticket was canvassed, no such ticket was found; but the committee, after carefully surveying the whole ground, were of the opinion, unanimously, that the point was not worthy of being entertained. Without having the ballots before us, how is it possible, we would ask, to be satisfactorily informed of their contents? Voters are frequently deceived as to their votes. It is probably within the experience of every member within this House, that voters think they are voting for one person, when in fact they are voting for his opponent. And in the case of illiterate men, it is very likely that they may have been imposed upon. But

the current of authority in this State is strongly against going behind the ballot-boxes. (See Ass. Doc. for 1846, vol. 2, No. 45; *ib.*, 1847, vol. 1, No. 16; *ib.*, 1848, vol. 5, No. 14.) In one of these cases, Bishop Perkins and Ira Harris, now a justice of the supreme court, were both on the committee, and they unanimously refused to go behind the ballot-boxes. It is true that, in the last contested case before this House (see Assemb. Doc. for 1850, vol. 4, No. 67), the committee resolved to depart from this safe and prudent rule; but in that case, the point involved was of a character totally different from the present. Here, neither fraud nor corruption is charged. No *prima facie* case, of mistake even, is made out. But without enlarging on this point further, we think that the statute, as before remarked, provides an ample remedy to the petitioner, without his asking leave or requiring the aid of this House.

The documents introduced by the sitting member, are, it should be remarked, perfectly regular on their face, and in the opinion of the undersigned, bear intrinsic evidence that no mistake was in fact made.

It is worthy of observation, too, and, perhaps, ought to be conclusive of the matter, that the proposed investigation, if it amounts to anything, would probably result in the entire vote of the district in question, being rejected on account of the uncertainty in which the proof would involve the whole affair. It is not to be tolerated, that any member of this House should be entitled to a seat, in opposition to the certificated member, on any uncertainty; and if the votes of that district are rejected, Mr. Jayne, the sitting member, has, beyond all doubt, mischance or peradventure, a clear and decided majority in the county.

The above is believed by the undersigned, members of your committee, to be a fair statement of the facts of this case, and unless your honorable body should deem it proper to reject and disregard the returns of the inspectors, and order the taking of testimony to ascertain for whom all the voters of election district No. 2, in the town of Jerusalem, voted, at the last general election, for member

of Assembly, they recommended the adoption of the following resolutions:

Resolved, That the petitioner, John Underwood, has wholly failed to establish, by legal evidence, his right to the seat claimed by him in this House.

Resolved, That the committee on privileges and elections be discharged from the further consideration of the petition of John Underwood, claiming a seat in the Assembly from Yates county, now held by Samuel Jayne, Jr., without prejudice to the right of said Underwood to renew his claim to such seat if he shall present evidence to this House impeaching the return of the inspectors of election district No. 2, town of Jerusalem, Yates county.

JAMES MAURICE.

ALBERT A. THOMPSON.

Assembly Documents, 1851, vol. 3, No. 55. See Documents accompanying the report.

Ordered, that said report be printed.

Assembly Journal, 1851, vol. 1, page 343. See also Assembly Journal, 1851, vol. 1, 3.

SPECIAL COMMITTEE APPOINTED.

IN ASSEMBLY, *February 24, 1851.*

By unanimous consent Mr. Elderkin offered for the consideration of the House, a resolution in the words following, to wit:

Resolved, That Hon. John H. Wooster, be associated with the chairman of the committee on privileges and election, in taking the testimony in case of the contested seat in this House, from the county of Yates.

Mr. Feller moved to amend, by adding H. J. Campbell, which amendment was accepted by Mr. Elderkin.

Mr. Speaker put the question whether the House would agree to the said resolution, and, it was determined in the affirmative.

Assembly Journal 1851, vol. 1, page 41.

COMMITTEE REQUESTED TO REPORT.

IN ASSEMBLY, *March 13, 1851.*

Mr. W. F. Russell offered, for the consideration of the House, a resolution in the words following, to wit:

Resolved, That the select committee having in charge the investigation of a contested seat in this House, between Messrs. Jayne and Underwood, of Yates county, be requested to report forthwith to this House, the result of their investigation.

Debate being had thereon,

Ordered, That said resolution be laid upon the table.
Assembly Journal 1851, vol. 1, page 564.

IN ASSEMBLY, *March 17, 1851.*

Mr. J. F. Clark, called for the consideration of the resolution heretofore offered by W. F. Russell, in the words following, to wit:

Resolved, That the select committee having in charge the investigation of a contested seat in this House, between Messrs. Jayne and Underwood, of Yates county, be requested to report forthwith to this House the result of their investigation.

Mr. J. F. Clark moved to lay the said resolution upon the table.

Mr. Speaker put the question and it was determined in the affirmative.

Assembly Journal 1851, vol. 1, page 636.

IN ASSEMBLY, *March 27, 1851.*

Mr. W. F. Russell moved to take from the table the resolution heretofore offered by him in the words following, to wit:

Resolved, That the committee appointed to take testimony in the case of the contested seat from Yates county, be instructed to report forthwith.

Mr. Speaker put the question, and it was determined in the affirmative.

Assembly Journal, 1851, vol. 1, page 718.

REPORT OF SELECT COMMITTEE — MR. JAYNE AWARDED SEAT.
IN ASSEMBLY, *March 29, 1851.*

By unanimous consent, Mr. Campbell from the committee (select) on privileges and elections, to which was referred the papers in relation to the contested seat from Yates county, reported in writing as follows, to wit:

REPORT OF THE SELECT COMMITTEE APPOINTED TO INVESTIGATE THE
CLAIM OF JOHN UNDERWOOD, FROM THE COUNTY OF YATES,
TO A SEAT IN THIS HOUSE.

The select committee appointed by the House, to take the testimony, and report in the matter of John Underwood, claiming a seat in the Assembly, as member from the county of Yates, in the place of Samuel Jayne, Jr., to whom the certificate of election was given, report that your committee proceeded to the county of Yates, and caused the witnesses for and against the claim, to be brought before them, and their testimony is herewith submitted.

Your committee beg leave to say farther, that the principal ground upon which Mr. Underwood claimed the right to the seat, was, *that the inspectors of election, in the second election district of the town of Jerusalem, had made a mistake* in canvassing the votes of said district.

The committee, after hearing the testimony, and giving the matter a careful examination, are of the opinion that the contestant, Mr. Underwood, was honest and sincere in the belief that a mistake had been made, and that he was justly and legally entitled to the seat; but the testimony shows conclusively, that he was mistaken and misinformed as to the true state of the facts of the case.

Your committee, would therefore, recommend the adoption of the following resolution:

Resolved, That John Underwood is not entitled to a seat in this Assembly.

P. W. BISHOP.

JOHN H. WOOSTER.

H. J. CAMPBELL.

Assembly Documents, 1851, vol. 1, No. 128. See Testimony Documents, at end of report; Doc. 1851, vol. 1, No. 128.

Mr. Speaker put the question, whether the House would agree to the said resolution, and it was determined in the affirmative.

Case of Ephraim L. Snow and Russell Smith.

COUNTY OF NEW YORK, SIXTEENTH DISTRICT — PETITION PRESENTED.

IN ASSEMBLY, *January 6, 1852.*

Mr. Walsh presented the petition of Russell Smith, praying that the seat occupied by Ephraim L. Snow be awarded to him, which was read and referred to the committee on privileges and elections.

Assembly Journal, 1852, page 10.

MR. SMITH INVITED TO OCCUPY A SEAT.

IN ASSEMBLY, *January 9, 1852.*

On motion of Mr. Taylor,

Resolved, That the petitioner, Russell Smith, claiming to have been elected in and for the Sixteenth Assembly District in the city and county of New York, be invited to occupy a seat on the floor of the House, but without prejudice to the rights of the sitting member.

Assembly Journal, 1852, page 43.

REPORT OF MAJORITY OF COMMITTEE.

IN ASSEMBLY, *February 19, 1852.*

Mr. Sheldon, from the committee on privileges and elections, to which was referred the petition of Russell Smith, claiming the seat held by Ephraim L. Snow as member of Assembly of the Sixteenth Assembly District of the city and county of New York, reported in writing.

REPORT OF THE MAJORITY AND MINORITY OF THE COMMITTEE ON PRIVILEGES AND ELECTIONS ON THE PETITION OF RUSSELL SMITH, CLAIMING THE SEAT NOW HELD BY EPHRAIM L. SNOW.

Mr. Sheldon, from the majority of the committee on privileges and elections, to which was referred the petition of Russell Smith, claiming the seat held by Ephraim L. Snow, as member of the Assembly from the sixteenth Assembly district of the city and county of New York, respectfully reports:

That by the return of the county canvassers Ephraim L. Snow was elected a member of Assembly from the sixteenth Assembly district of the city and county of New York, by a majority of three votes over Russell Smith, the petitioner. Mr. Smith claims that irregularities existed in the proceedings of the board of inspectors of election in the sixteenth Assembly district, which if corrected would give him a majority over Mr. Snow.

By mutual agreement the parties submitted the following as the whole evidence of the case:

A certified copy of the poll list of the fourth election district.

A certified copy of the statement and return of the votes of the fourth election district, and a tabular statement of the votes given in each district.

An affidavit made by W. H. Pearsall.

A certified copy of twelve affidavits made by the following persons:

For Mr. Smith, John Stephenson, Edward C. Graham, Amos Hatfield, Thomas Conaten, James Johnston, E. Fitch Smith, Patrick O'Keefe.

For Mr. Snow, Sidney H. Stewart, John Paxton, Elisha C. Jones, Charles Mann.

The affidavits accompany this report, and are marked "A." Also the tabular statement of the votes given in each election district, marked "B."

As the evidence is presented Mr. Smith relies upon four points:

1. The inspectors of the fourth election district committed such errors that the vote of that district should be rejected.

2. If the vote of that district is not rejected, two votes given for Mr. Smith which were drawn from the ballot-box and destroyed as excess of ballots by the inspectors, should be counted.

3. Two votes should be allowed which were destroyed as a double ballot.

4. One vote given to the inspectors by Patrick O'Keefe, but not put into the ballot-box, should be counted for Mr. Smith.

It is not claimed by Mr. Smith that the alleged irregularity in second election district can vary the result in his favor.

The affidavit of W. H. Pearsall contains all the evidence in relation to the second election district.

One of the affidavits of Thomas Conaten and the affidavits of Smith and O'Keefe contain the evidence relating to the O'Keefe vote.

The remaining nine affidavits contain the evidence relating to the proceedings of the board of inspectors of election of the fourth district while canvassing the votes.

The affidavits, except the affidavit of W. H. Pearsall, were prepared in November last, and were used at a hearing of the case before the board of county canvassers of the city and county of New York.

By the certified copy of the statement of the votes given in the fourth election district, it does not appear that any ballots were attached to the returns, or that any returns were made by the inspectors of the scattering votes given for member of Assembly in that district.

By the certified copy of the poll list of the fourth election district there appears to be six hundred and eighteen votes marked in the Assembly column.

By reason of the conflicting and indefinite character of the evidence presented the committee have unfortunately been unable to agree in a report.

The undersigned of the committee have made the following examination of the case which is submitted for your consideration:

The first point presented by Mr. Smith is, that all the votes of the fourth election district should be rejected, on the following grounds:

1. Fraud on the part of one of the inspectors while drawing an excess of two ballots from the box.
2. The inspectors did not attach to the returns one ballot of each kind cast at the election, and did not make a return of the scattering votes given for member of Assembly.

The evidence relied upon to show fraud in the drawing of the two ballots is contained in the affidavits of Conaten and Johnson.

It sets forth in substance that the ballots given for Mr. Snow were about double the size of those given for Mr. Smith; that after they were opened they were returned into the box and Charles Mason, one of the inspectors, was chosen to draw two ballots, as there was an excess of ballots over the names on the poll lists; that Mason in drawing did not draw the first ballot he touched, but moved his hand about in the box, and each time drew one of Smith's votes; that the chairman of the board remarked to him while drawing not to finger the ballots, but to draw; that a few minutes after this one of the inspectors asked him how he came to draw two Smith tickets; he replied it could not be expected he would draw two whig tickets.

This evidence is contradicted in the affidavits of Paxton, Jones and Mason. Jones states that he saw and heard nothing on the part of the canvassers, clerks, or any citizen present, in any degree indicating the practice of fraud or unfairness, nor heard any ex-

pression of dissatisfaction in regard to the proceedings of the inspectors; that he witnessed the drawing of the two ballots, and discovered nothing like dishonesty, and heard no expression of any suspicion of unfairness.

The inspector, Mason, denies the practice of fraud, and denies that any person said to him not to finger the tickets. He admits that when he was asked how he came to draw two Smith tickets that he in a sportive manner made a similar reply to the one stated by Conaten.

The members of the committee all agreed that there was not sufficient evidence to establish fraud in drawing the two tickets and likewise agreed in opinion that the irregularities of the inspectors in not attaching the ballots to the returns, and in not making a return of the scattering votes, did not make the election void or authorize the rejection of the vote of the whole district.

Mr. Smith's second point is, that the two ballots drawn from the box as excess of ballots, were improperly destroyed for the following reason:

1. There was only an excess of one ballot.
2. The two votes were not drawn until after the ballots were opened and separated.

By the copy of the poll list there appears to be six hundred and eighteen votes designated in the Assembly column; and by the affidavit of Johnston, there were six hundred and nineteen ballots, not counting two votes destroyed as a double ballot; but Johnston also states that the ballot exceeded the number on the poll list by two; that there was an excess of two is sworn to by five of Mr. Smith's witnesses and two of Mr. Snow's, and contradicted by none. If the copy of the poll list is taken as the best evidence of the number of votes which were in the Assembly column it is more reasonable to suppose that Johnston was mistaken as to the number of ballots than to believe that he was mistaken as to the number of excess; and that six other witnesses were also mistaken as to the number of excess, including the two clerks and two of the inspectors.

It is believed, that there was an excess of two votes. As to the drawing of the excess, it appears from the evidence that the inspectors in canvassing the votes, first counted the ballots, and it was found that the ballots exceeded the poll lists, but that the poll lists did not agree. That while the clerks were correcting the lists, the inspectors proceeded to open the ballots; that after the poll lists were corrected and the ballots opened, the ballots exceeded the poll lists by two (not including the two votes which were claimed to be a double ballot), that thereupon the ballots were returned into the box and the two votes drawn out.

The statute (section 39, article 4, Revised Statutes), provides that "if the ballots shall be found to exceed in number the whole number of votes on the corresponding columns of the poll lists they shall be replaced in the box and one of the inspectors shall, without seeing the same, publicly draw out and destroy so many ballots unopened as shall be equal to such excess."

The forty-first section of the same statute is as follows:

"If after having opened or canvassed the ballots it shall be found that the whole number of them exceeds the whole number of voters entered on the poll lists the inspectors shall return all the ballots into the box, and shall thoroughly mingle the same, and one of the inspectors, to be designated by the board, shall publicly draw out of such box, without seeing the ballots contained therein, so many of such ballots as shall be equal to the excess which shall be forthwith destroyed."

The poll lists should have been corrected and the excess of ballots drawn before the ballots were opened. Although the excess of ballots should have been drawn before the same were opened, the undersigned of the committee are clearly of the opinion that it was the duty of the inspectors upon discovering their neglect to return the ballots into the ballot-box and thoroughly mingle the same, as the inspectors did do, and draw therefrom the actual excess, and that such drawing is required by the last section above referred to, and would be valid.

The third point which the contestant makes is, that two of his votes were destroyed as a double ballot which he claims were single votes accidentally slipped together in the ballot-box.

The only question arising upon this point is that the votes destroyed have the *appearance* of having been voted together.

The evidence relating to it is as follows:

Stephenson's affidavit says: "Among the ballots were found two for Russell Smith slipped together which were interlocked and not folded together as this deponent verily believes."

Graham says he has read Stephenson's affidavit and the same is true.

Hatfield says: "among the ballots were found two ballots for Russell Smith slipped together."

Conaten, one of the inspectors, says that while they were canvassing, the chairman of the board, a Mr. Farnham, destroyed two ballots given for Mr. Smith; that he did it suddenly without giving the other inspectors an opportunity to examine and see whether they were single ballots or a double ballot.

Johnston says: "the inspectors destroyed two ballots given for Russell Smith alleging that they constituted a double ballot."

Stuart says: "a double ballot was destroyed." Mr. Jones calls it a double ballot. Mr. Paxton, one of the clerks, says that the affidavit of Mason is true.

Mr. Mason, the inspector, states in regard to the double ballot, as follows: "The said double ballot was not destroyed by the chairman of the inspectors as stated by Conaten, without the consent of the deponent and himself, and without giving them time and an opportunity to examine it; deponent says that the double ballot was a matter of special consideration by all three of the inspectors; that he and the said Conaten, conferred together with respect to the said ballot, and on inspecting it at once agreed that it was a double ballot; said Conaten himself found said ballot among the other ballots, and as soon as found and inspected pronounced it a double ballot, and handed it to the chairman; it was kept and sub-

sequently more than an hour afterwards thoroughly examined by the board and unanimously declared to be a double ballot, and the chairman of the inspectors (Mr. Farnham) directed to destroy it, who did so; deponent says that from the fold and general appearance of the ticket, it was perfectly evident that two single tickets had been folded together before they had been voted, and that they could not have accidentally become interlocked in the ballot-box in the folds combining, the tickets being of such a character as to leave no doubt that they had been folded together before they were voted. "They were not at any time separated or taken apart, but were destroyed in the same fold they were found."

This constitutes the whole evidence relating to the double ballot.

The three witnesses who swear they believe it to have been two votes slipped together, do not give a reason for their belief, do not even state that they ever saw the ballot, or had an opportunity of inspecting it. Conaten, who swears that it was suddenly destroyed, does not say but what he believed it to have been a double ballot, and Mason states, which is not denied, that Conaten himself found the ballot and handed it to the chairman as a double ballot. Not one of the inspectors or the clerks state that they believe it to have been any thing but a double ballot. Two of the inspectors, if not all three, called it a double ballot and consented to its being destroyed as such.

The majority of your committee have been unable to see in the case sufficient evidence to convince them that this ballot was two single votes accidentally slipped together in the ballot-box.

The fourth point is, that the vote of Patrick O'Keefe was not put into the ballot-box.

The evidence shows that Patrick O'Keefe delivered a vote for Mr. Smith, with other votes to the inspectors; that his name was given and the ballots distributed; the inspectors did not put them into the box. No explanation is given, except that Conaten states that he consented to their being put away, as he was under the im-

pression that O'Keefe should have stayed until his votes were put into the box.

The evidence is uncertain. There is no proof that there was an excuse for putting away the votes, or that there was not a reason for it.

If a person should appear at the board and give his votes and name to the inspectors, and should then leave before the inspectors had put the votes into the ballot-boxes, and before they had had an opportunity of inquiring as to the qualifications of the person offering to vote, it certainly would be their duty to reject the votes which they had received.

It appears that O'Keefe remained at least, but a very short time at the polls, not long enough to have the inspectors decide to put his vote into the box; he might have left abruptly.

The undersigned of your committee are therefore of the opinion that it should not be *presumed* that there was no excuse for putting aside the vote of O'Keefe; it should be *proved* there was none, before allowing a vote which had never been deposited in the ballot-box, or canvassed, or returned as a vote.

This brings us to the irregularity of the second election district; all the evidence in regard to it is contained in the affidavit of W. H. Pearsall. It sets forth that the inspectors in canvassing the votes found six double ballots for Mr. Smith, and one for Mr. Snow; that the whole number of ballots, including the double ballots, exceeded the poll list by three; that the inspectors destroyed three of the double ballots for Smith, and counted the remaining four double ballots; also that two Assembly ballots for Mr. Smith, were found in the charter box, which were destroyed. It is believed by the majority of the committee that all of the double ballots should have been destroyed.

The thirty-seventh section of the statute, before referred to, requires that "if two or more ballots shall be found so folded together as to present the appearance of a single ballot they shall be destroyed if the whole number of ballots exceed the whole number of voters and not otherwise."

It is claimed for Mr. Smith that only three of the double ballots should have been destroyed. The answer to this is that the statute requires the whole to be destroyed as much as one. When there are several double ballots it makes no provision for selecting a part to be destroyed, and for counting the remainder. When there is more than one double ballot, and there is an excess of votes, all of the double ballots must share the same fate.

When two or more ballots are found together as one, they are counted only on the supposition that they slipped together in the ballot-box; if to separate and count them would make the votes exceed the poll lists, that supposition is destroyed.

It is claimed that the four double ballots were counted as one vote each. There is no evidence that they were counted in that way; if it is proper to count a double ballot, certainly all the votes of which it is composed should be counted; there is no provision for counting half of a double ballot and destroying the other half.

If the four double ballots were counted as one vote each, Mr. Smith gained two votes by the irregularity; if the votes were separated and counted he gained four.

It is claimed by Mr. Smith that if all the double ballots should have been destroyed that would have permitted a counting of the Assembly votes found in the charter box.

It is believed that this view cannot be sustained. The thirty-eighth section of the statute before referred to, is as follows: "No ballot, properly indorsed, found in a box different from that designated by its indorsement, shall be rejected, but shall be counted in the same manner as if found in the box designated by its indorsement, provided that by the counting of such ballot or ballots, it shall not produce an excess of votes over the number of votes as designated in the poll list."

From this it appears if the votes found in the Assembly box had been less than the number upon the poll list, it would have been proper to have counted the Assembly votes found in the charter box; but an excess was already found in the Assembly box. Can there be any reason in the position that when the votes found in a

proper box equal or exceed the poll lists, that the destruction of some by reason of their being double or defective, will authorize the counting of votes found in the wrong box?

Ballots found in an improper box when counted, or counted on the supposition that the inspector placed them there by mistake; if the votes in the proper box are found to be less than the number found upon the poll list, the statute holds it good evidence that the mistake has been made; but if the votes found in the proper box equal or exceed the number on the poll list, the evidence fails, and it will be presumed that they found their way into the wrong box by the electors voting two votes of a kind, or by being secreted accidentally or otherwise in a vote belonging in the box where they were found.

The majority of your committee are, therefore, of the opinion that from the evidence, Mr. Snow lost four votes by the irregularity in the second election district which should be allowed him, and admitting that the double ballots were counted as one vote each, which admission the evidence does not justify, Mr. Snow then lost two votes.

There are in this case incidental points which have not been referred to. Most of these arise out of conflicting statements in the affidavits. Some of them may have a bearing upon the main question presented.

It may be proper to notice in connection with the drawing of the two ballots, in the fourth election district, that it is claimed that the scattering ballots were not returned into the box at the time of drawing the excess of ballots. If they were not returned, it cannot be seen that it gave either of the contestants an advantage over the other.

The majority of the committee are of opinion, that the weight of evidence is strongly in favor of the conclusion, that all the ballots were returned. Two witnesses state that they were not returned; three state they were returned; two of them swear to a direct recollection of the fact, and give reasons for recollecting it.

During the investigation of this case, some stress has been laid

upon the fact, that Mr. Smith received a greater number of votes than Mr. Snow. If he received a greater number of votes than Mr. Snow, which could be counted and allowed to him under the rules and regulations of the election law, he certainly should be declared elected. If anything more than this is claimed, it is regarded as a very dangerous doctrine. It has been said that the evidence in regard to the six double ballots was introduced for the purpose of showing that Mr. Smith was the choice of a majority of the electors of his district.

If these ballots should have been destroyed as double ballots, the fact that they existed should not be used as evidence for any purpose whatever, and more particularly should not be used to improperly influence the minds of those who are to decide each of the *legitimate* points in this case upon the evidence, and upon the rules and principles of law applicable to it.

The question has not been how many votes were actually cast for either party? but how many will remain for each, after a legal canvass?

The two votes drawn from the ballot-box in the fourth election district, and the double ballot as two votes, must be counted for Mr. Smith; and the irregularity in the second district must be disregarded or Mr. Smith is not elected. The undersigned of the committee cannot see how either of these things can be done without disregarding plain and well settled rules of evidence, and violating the law regulating the canvassing of votes.

It is recommended that the following resolutions be adopted:

Resolved, That the prayer of the petitioner be denied.

Resolved, That Ephraim L. Snow is a member of Assembly, duly elected from the sixteenth Assembly district of the city and county of New York.

A. SHELDON.

A. E. RICHMOND.

H. B. BULL.

Assembly Documents, 1852, No. 46. (See affidavit accompanying report.)

REPORT OF MINORITY OF COMMITTEE.

Mr. Keyes, from the minority of said committee, also reported the following:

MINORITY REPORT OF THE COMMITTEE ON PRIVILEGES AND ELECTIONS, ON THE PETITION OF RUSSELL SMITH, CLAIMING A SEAT AS A MEMBER OF THE ASSEMBLY, FROM THE SIXTEENTH ASSEMBLY DISTRICT OF THE CITY AND COUNTY OF NEW YORK.

The committee on privileges and elections, to which was referred the petition of Russell Smith, claiming a seat in the Assembly, as member from the sixteenth Assembly district, of the city and county of New York, now held by Ephraim L. Snow, report that the parties have appeared before your committee in person, and by their respective counsel; that they have received such proofs as were offered by the parties, and have heard counsel in their behalf respectively, and that the following facts have been proved before your committee by evidence which is undenied and undisputed.

1. That the petitioner, Russell Smith, received a numerical majority of all the votes cast for member of Assembly in said sixteenth Assembly district, at the general election held therein, on the fourth day of November, 1851.

2. That Russell Smith received in the first, second, third and fifth election districts, in the said Assembly district, seventeen (17) more votes than were given for Mr. Snow, taking the votes given for Mr. Smith and Mr. Snow respectively, which were allowed and certified to them respectively, by the returns of the election held in such districts, certified by the several inspectors thereof, and that in the second election district, Mr. Smith received five more votes than were allowed to him; three of which were destroyed, on the ground that they were double ballots, and that the whole number of ballots exceeded the number of votes recorded upon the poll lists, and the remaining two were also destroyed on the ground that they were found in a box other than the Assembly box, and that the whole number of ballots exceeded the number of votes found recorded upon the poll list.

3. That Russell Smith had in the ballot-box of the fourth election district in said Assembly district, at the closing of the polls, two hundred and ninety-five votes, and that Ephraim L. Snow had in the same box at the same time, three hundred and eleven votes; that if Mr. Smith be not legally and fairly deprived of any of the votes given for him and found in said ballot-box, he was duly elected a member of this House, to represent said sixteenth Assembly district, by a majority of one vote over Mr. Snow.

4. That Patrick O'Keefe, a legal voter of said fourth election district, attended the election held therein, on the fourth day of November last, and voted for said Russell Smith for member of Assembly; that his vote was not challenged or questioned in any manner, and his ballot for said Smith was received by said inspectors of election, together with other ballots presented and voted by him, and was declared by said inspectors to be a full vote given thereat, by said Patrick O'Keefe, and said ballots were distributed by said inspectors and placed by them upon the proper boxes to be deposited therein, that said P. O'Keefe, having accomplished his purpose of voting at said election, thereupon left the polls whilst the ballots so given by him were lying upon the appropriate ballot-boxes; that the inspectors then observing that said O'Keefe had left, threw away the ballots so voted by him, and did not put them in the ballot-boxes, on the supposition on the part of the inspectors that it was necessary for such elector to remain after giving his vote until the inspectors had deposited such vote in the ballot-boxes.

5. That after the poll of the election held in said fourth election district had finally closed, the inspectors did not commence the canvass by a comparison of the poll list from the commencement, and a correction of any mistakes found therein, as required by section thirty-six of the election law; on the contrary, the inspectors proceeded to count the ballots contained in the Assembly ballot-box, and after counting the same, found that there were three ballots in excess of the poll list of one of the clerks, and four ballots in excess of the poll list kept by the other clerk. That the inspectors did not

then proceed to compare the poll lists, and to correct any mistakes therein, nor did they, upon finding that the ballots exceeded the whole number of votes upon either of the poll lists, replace the said ballots in the box unopened, and draw out and destroy so many ballots unopened as should be equal to such excess, as required by section thirty-nine of the election law; on the contrary, the said inspectors proceeded to open, and read and canvass the ballots, and after they had opened, and read and canvassed the said ballots, and ascertained that the whole number of ballots exceeded the whole number of votes recorded on the poll list, they directed the clerks for the first time, to examine and correct the poll list. This course was protested against at the time.

6. That after comparing the poll lists and making them to agree, the aggregate number of votes recorded thereon was reported at six hundred and seventeen for member of Assembly, and the number of ballots for said office was reported to be six hundred and nineteen. That the tickets which had been canvassed for Mr. Smith and Mr. Snow were then put back into the ballot-box, and one of the inspectors was directed to draw therefrom two ballots to reduce the number of ballots to the number of votes recorded on the poll list. That the ballots voted at said election for Mr. Snow, were uniform in size, and were nearly double the size of those voted for Mr. Smith, which were also uniform in size; that they were about an inch longer, and printed upon much thicker paper, so that a person who had opened and read the ballots for Mr. Snow and Mr. Smith, could readily distinguish, by his sense of touch, without looking at the same, those given for Mr. Smith from those given for Mr. Snow. Two ballots given for Mr. Smith were drawn out of said box by the said inspector, and were then destroyed and not counted; the length of time that was occupied by the inspector who made the draft, after he commenced and before he drew out the ballot, was remarked upon at the time. The state of facts which have a bearing on the question of the fairness of this drawing will be hereinafter stated.

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7. Two ballots found in said box given for Russell Smith were destroyed by the inspectors, on the allegation that they were a double ballot; the evidence bearing upon this question will be hereinafter stated.

8. It appears by an accurate footing up of the poll list of said fourth district, as corrected and produced before the committee, that the number of votes recorded therein is six hundred and eighteen (618) instead of 617 as was supposed by the inspectors, and that by their error in this respect they drew out one ballot too many from the ballot-box, and thereby deprived Mr. Smith of one legal vote.

It also appears from the returns of said inspectors and the poll list that the whole number of votes given was greater than the aggregate number of votes certified by them to have been given by sixteen votes; the evidence before the committee shows that votes were given in said district for Wm. D. Green and others; but how many were given for Green, and who the others were who were voted for, and whether the other tickets so found were properly indorsed to designate another ballot-box, does not appear; and no evidence upon either of these questions has been produced to the committee. The committee, therefore, have no means of determining whether or not, the whole number of Assembly tickets proper did actually exceed the number of votes recorded on the poll list, and if they did not, Mr. Smith was evidently both illegally and unjustly deprived of the two ballots destroyed on the alleged ground that they constituted a double ballot, and also of the two ballots drawn from the ballot-box.

9. On the question whether the ballots of Mr. Smith were destroyed upon the allegation that they formed a double ballot, the evidence of three witnesses has been produced on his part, showing that these two ballots were slipped together and were interlocked, and that they did not form a double ballot; one of the inspectors swears expressly, that these ballots were destroyed hastily and without his consent, and without his having an opportunity to examine them, and that he protested against it; the fact that this inspector

made a protest against it is proved by a witness on the part of Mr. Snow; one of the clerks and one of the inspectors swear that these ballots were destroyed before the poll lists were fully compared by the clerks; one of the inspectors alleges that the ballots were destroyed, after they had been examined by all of the inspectors and by their consent, and that this destruction was made after the poll list had been compared, and that the ballots destroyed formed a double ballot. The inspector who attests the fact is the same who made the draft of the ballots from the box having thereon the name of Mr. Smith and whose fairness is strongly drawn in question by the uncontradicted and reliable testimony before the committee.

10. When the ballots were replaced in the box to draw out and destroy the excess, one clerk and one inspector swear that the ballots given for Wm. D. Green, and others, were not put in the box. A bystander has testified that all the ballots upon the table were put back, but he does not swear that the scattering ballots were lying upon the table. One inspector (Mason) swears according to his recollection and belief that they were put back.

11. At the time of the proceeding in the fourth election district, the result of the election for member of Assembly in the other districts and the majority for Mr. Smith therein was known to the canvassers.

12. The occupant of the seat from the said sixteenth district raised a question whether the votes allowed to Mr. Smith and Mr. Snow out of the double ballots in the second district should not be rejected. The counsel for Mr. Snow admitted before the committee that he had no doubt but that only a single ballot from each of the double ballots was allowed. The affidavit in relation to this district was introduced only for the purpose of showing that Mr. Smith received a larger majority of the votes of the qualified voters than he claimed to have allowed to him as necessary to secure his election. The present election law does not appear to contemplate or authorize the destruction of any double ballots, except in a case where the number of ballots shall exceed the number of votes re-

corded upon the poll list and then, only the excess. If the allowance of such votes was an error in judgment on the part of the inspectors in the second district, it would not authorize the setting aside of the whole returns from that district, because the precise extent of that error is ascertained, and may be corrected. Changing the votes, as is claimed by Mr. Snow, the committee should do, would deprive Mr. Smith of three votes and Mr. Snow of one vote; by making that change, the number of votes counted would be less than the number of votes given, as shown by the poll list, and Mr. Smith was then entitled to the two votes given for him for member of Assembly which were found in the charter box properly indorsed "Assembly." Adding these to his vote and taking from him three votes, and from Mr. Snow one vote allowed from the double ballots, and the result of the election in the second district will remain as it was returned, so far as it respects the rights of the parties to the seat in question.

Upon the conceded facts, and upon this state of the evidence in regard to the disputed facts, the question has been submitted to the committee, whether the petitioner is not legally entitled to the seat in this House now occupied by Mr. Snow; the committee have regarded the question as an important one, not only with reference to the obligation resting upon them to give effect to the clearly expressed choice of the electors, but also in regard to the observance of the forms prescribed by law to ascertain and preserve the evidences of the will of the electors, and which are intimately connected with the preservation of the elective franchise.

The term election, as used in our statutes, means the act of choosing a person to execute the duties of a particular office, performed by electors who are duly qualified and in the manner prescribed by the Constitution and laws; it cannot be questioned, that duties prescribed by law to be performed by inspectors of election, are mainly ministerial, and that votes fairly and honestly given ought not to be set aside for any omission or mistake of the returning officers. But a different question arises where it appears that votes actually given have been destroyed or excluded from the canvass by the officers.

The party in whose favor a ballot has been found to have been actually given has a legal right to have that ballot counted and returned for him, unless those who dispute the right can show a valid and sufficient reason in law, or in fact, for rejecting it. In this case Mr. Smith had the numerical majority of all the votes actually found in the ballot-boxes, given for member of Assembly in said sixteenth Assembly district. The burden rests upon those who dispute his right to show that he has been legally and fairly deprived of a portion of these votes.

In the present case, so far as it respects the two votes drawn from the ballot-box as an excess over the votes on the poll list, the evidence is conclusive that they were illegally destroyed. The poll list shows on an actual footing of the number of votes given, that one too many was drawn out. This might be cured by adding that vote to the number returned for Mr. Smith, but the manner of drawing the other vote was plainly illegal. After the votes had been canvassed and separated, the mere gathering together of the separate heaps and throwing them back into the ballot-boxes (even if all the votes had been returned) rendered it almost morally certain that the votes drawn would be all for one candidate. It prevented any chance for that fair and impartial drawing which the statute requires, and its results accorded with the mode adopted. It is impossible to see what might have been the result if the legal mode had been pursued. Mr. Snow has been returned to this House by a majority of three; giving to Mr. Smith the vote that was destroyed by reason of the mistake in the footing of the poll list that majority is reduced to two. If the drawing had been in accordance with the law on that subject one vote given for Mr. Snow might have been drawn and that for Mr. Smith have been left. Taking one from Mr. Snow's vote and adding one to that of Mr. Smith's would have made a tie between them without having referred to the vote of Mr. O'Keefe or the alleged double ballot; either of these would have given Mr. Smith a clear majority. As the committee cannot see what would be the result if the law had

been complied with they are constrained to say that Mr. Smith has not been legally deprived of the votes given for him. The omission to put back all the ballots into the box before drawing, which appears to be established by the weight of the testimony, also deprived Mr. Smith of the chance that one of these might have been drawn.

Upon the question whether the two ballots destroyed constituted a double ballot, the rules of evidence applied to the testimony leave no doubt that Mr. Smith was not legally deprived of these votes. The burden of proving that these constituted a double ballot rests upon Mr. Snow. The fact must be clearly and satisfactorily proved. Without observing further upon the evidence than to remark that the witness who proves it occupies a very questionable position, by his own showing, and is contradicted by four witnesses, and that his associate, to whom he refers, has given no evidence to sustain him; the conclusion of fact is that these votes were not a double ballot nor properly destroyed as such. The right of Mr. Smith to have the vote given by Mr. O'Keefe in his favor appears to be unquestionable. So far as the act of the voter is concerned he has performed his part when he has deposited his ballot in the hands of the inspectors, and they receive it as such and declare his vote. It is then given, and no neglect or omission of the inspectors to put it in the proper box, or to count it, can annihilate that part. This rule imposes a necessary restraint upon ignorance, and will form an invaluable safeguard against corruption. The perverse motives which too often actuate human conduct are multiplied by a closely contested election and it is incumbent upon all tribunals who may determine the question, not to add to the powers of ministerial officers to defeat the suffrage of any voter, or to control the result. Judging of the election in this case, whether by the law regulating the subject or by the exercise of the elective power by the voters, it appears that Mr. Smith has received a majority of all the votes cast for member of Assembly in the said sixteenth district, and has been duly elected a member of this

House to represent that district. The committee beg leave to offer the following resolutions:

Resolved, That Ephraim L. Snow is not entitled to a seat in this House as the representative of the sixteenth Assembly district in the city and county of New York.

Resolved, That Russell Smith is entitled to a seat in this House as the representative of the sixteenth Assembly district in the city and county of New York.

HARVEY KEYES.

THOMPSON WHITE.

Assembly Documents, 1852, No. 46.

Mr. Cushing moved that both of the said reports, together with the testimony, be printed.

Mr. Speaker put the question whether the House would agree to the said motion of Mr. Cushing, and it was determined in the affirmative.

Mr. Van Santvoord moved that the said reports be made the special order for Wednesday next, immediately after receiving petitions, and that Mr. Smith, the contestant, be permitted to appear before the House, and be heard in favor of his claim.

Mr. Speaker put the question, whether the House would agree to the said motion of Mr. Van Santvoord, and it was determined in the affirmative.

Assembly Journal, 1852, page 312.

IN ASSEMBLY, *February 26, 1852.*

Mr. Smith offered the following as a substitute for the several resolutions offered by the majority and minority of the committee on privileges and elections, to wit:

Resolved, That Russell Smith has not established his claim, preferred in his petition to a seat in this House, as having been elected in the sixteenth Assembly district of the city and county of New York, and that the prayer of the petitioner be denied.

Mr. Van Santvoord moved to amend the substitute, by striking out all after resolved, and insert as follows:

“That Ephraim L. Snow is not entitled to a seat in this House, as the representative of the sixteenth Assembly district of the city and county of New York.” Said amendment was accepted by Mr. Smith.

Mr. Speaker put the question, whether the House would agree to the substitute of Mr. A. Smith, as amended by Mr. Van Santvoord, which was decided in the negative. Ayes 55, nays 58.

Prayer of petitioner denied.

Mr. Speaker then put the question on the first resolution, which was in the words following; to wit:

Resolved, That the prayer of the petitioner be denied, which was adopted. Ayes 58, nays 57.

Assembly Journal, 1852, pages 343, 344, 345, 346, 348, 349, 350, 351, 352.

SEAT IN SIXTEENTH DISTRICT DECLARED VACANT.

IN ASSEMBLY, *February* 27, 1852.

Mr. Walsh offered for the consideration of the House, a resolution, in the words following, to wit:

Resolved, That the seat in this House, of member of Assembly from the sixteenth Assembly district, is hereby declared vacant.

Mr. Speaker put the question, whether the House would agree to the said resolution, and it was determined in the affirmative.

Ayes, 52; noes, 13.

A CALL OF THE HOUSE.

See, for proceeding relative to a call of the House, Assembly Journal, 1852, pages 370 to 381.

Contested Seat between Jacob Westbrook, Jr., and Job Ellmore.**SECOND DISTRICT, ULSTER COUNTY — CLAIM TO SEAT OF J.****WESTBROOK, JR., PRESENTED.****IN ASSEMBLY, *January 9, 1852.***

Mr. Ball presented the petition of Job Ellmore, claiming the seat of J. Westbrook, Jr., which was read and referred to the committee on privileges and elections.

Assembly Journal, 1852, page 42.

MR. ELLMORE ALLOWED TO OCCUPY A SEAT.**IN ASSEMBLY, *January 16, 1852.***

Mr. Van Santford offered for the consideration of the House a resolution in the words following, to wit:

Resolved, That Job G. Ellmore, of Ulster, be allowed to occupy a seat on the floor of this House during the pendency of his application to be admitted a member of the House in the place of Jacob Westbrook, Jr., without prejudice to the right of the sitting member.

Debate being had thereon,

Ordered, That said resolution be laid on the table.

Assembly Journal, 1852, page 77.

IN ASSEMBLY, *January 17, 1852.*

The House proceeded to the consideration of the last mentioned resolution, and

Mr. Speaker put the question on the adoption of the resolution, and it was determined in the affirmative.

Assembly Journal, 1852, page 86.

REPORT OF COMMITTEE — SEAT RETAINED BY MR. WESTBROOK.**IN ASSEMBLY, *February 3, 1852.***

Mr. Sheldon, from the committee on privileges and elections, to which was referred the petition of Job G. Ellmore, claiming the

seat occupied by Jacob Westbrook, Jr., as member of the Assembly from the county of Ulster, reported, in writing, as follows, to wit:

REPORT OF THE COMMITTEE ON PRIVILEGES AND ELECTIONS, ON
THE PETITION OF JOB G. ELLMORE, CLAIMING THE SEAT HELD
BY JACOB WESTBROOK, JR.

Mr. Sheldon, from the committee on privileges and elections, to which was referred the claim of Job G. Ellmore to the seat in the Assembly, held by Jacob Westbrook, Jr., reports Job G. Ellmore and the sitting member, Jacob Westbrook, Jr., appeared before the committee and introduced evidence, but finally agreed upon the following facts:

By the canvass of the board of county canvassers of the county of Ulster, Mr. Westbrook, was declared duly elected member of Assembly in and for the second Assembly district in said county by a majority of eighteen votes over Mr. Ellmore; that Mr. Westbrook had allowed to him in said canvass a majority of one hundred and sixty-nine votes over Mr. Ellmore in the town of Rosendale in said Assembly district; that at the town meeting in the said town of Rosendale, held in 1851, three inspectors of elections were chosen for said town; that two of said inspectors within ten days after their election took the usual constitutional oath of office before a justice of the peace, and the other inspector took the like oath before a justice of the peace on the morning of the day of holding the general election in November last. The inspectors then proceeded to organize a board by appointing a chairman, and then conducted the election during the day; but the chairman of the board neglected to administer the oath of office to the other inspectors, and neither of the inspectors administered an oath to the chairman as required by sec. 2, art. 1, title 4 of the Revised Statutes.

This section provides that "the inspectors shall appoint one of their number chairman of the board, who shall administer to the other inspectors the oath of office as prescribed by the Constitution,

and the same oath shall then be administered to the chairman by one of the other inspectors."

It is claimed by Mr. Ellmore that this neglect of the inspectors renders the election void in the town of Rosendale, and that the vote of that town should be rejected.

The case presents two points:

1st. Was the oath taken by the inspectors valid?

2d. If the oath of inspectors was not valid, can the election be held good.

Upon examination of the first point the committee is of opinion that the oath taken by the inspectors being before a justice of the peace, was wholly unauthorized by law, and consequently of no binding force whatever. A justice of the peace has no jurisdiction to administer an oath of this character.

Where an oath of office is required to be taken before a specified officer, it is made a special exception in the general authority given certain officers to administer oaths. See vol. II, Revised Statutes, p. 383.

The second point in this case is more important, but in the opinion of your committee is relieved of all difficulty by applying to it a well settled principle of law. It is, that the acts of officers *de facto*, while within the limits of their official duties, as far as third persons and the public are concerned, are valid. This doctrine is clearly held in judicial decisions reported in 7 John. Rep., p. 549; 9 John. Rep., p. 135, and other cases too numerous to be cited. The inspectors of the town of Rosendale were properly elected and faithfully performed their duties as inspectors, except neglecting to take the official oath; shall the public suffer by this neglect?

It is claimed by the contestant that no legal rule or even legislative enactment can dispense with the necessity of taking this oath, as the twelfth article of the Constitution requires that all executive and judicial officers (except such inferior officers as by law may be exempt) shall before they enter upon the duties of their office take an official oath, the form of which is incorporated into the Constitution.

It is believed that inspectors of election are not judicial officers, within the meaning of this article. See 8 Wen. Rep., 467; 11 John. Rep., 113, and authorities there cited.

It is known that a variety of opinions exists as to the effect which irregularities in the proceedings of boards of inspectors should have upon the validity of elections. Boards of county canvassers and other tribunals, are frequently found giving opposite decisions. It is to be regretted that there are so few general rules established by which to be governed; but the undersigned of your committee would hesitate long before aiding to establish a precedent, which if followed would frequently disfranchise large numbers of electors. They therefore concur in offering for your consideration the following resolution:

Resolved, That Job G. Ellmore is not duly elected member of Assembly, from the second Assembly district in the county of Ulster.

A. SHELDON.

H. B. BULL.

HARVEY KEYES.

A. E. RICHMOND.

Assembly Documents, 1852, No. 28.

ADOPTION OF REPORT.

Mr. Speaker put the question whether the House would agree to said resolution, and it was determined in the affirmative.

Assembly Journal, 1852, page 191.

Contested Seat between Andrew S. Warner and Jacob M. Selden.

SECOND DISTRICT OSWEGO COUNTY — PETITION OF ANDREW S. WARNER PRESENTED.

IN ASSEMBLY, *January 2, 1855.*

Mr. Speaker presented the petition of Andrew S. Warner, of Sandy Creek, Oswego county, claiming to be elected member of

Assembly, from the second Assembly district, of Oswego county, instead of Jacob M. Selden, who received the certificate, which was read and referred to the committee on privileges and elections. Assembly Journal, 1855, vol. 1, page 54.

REPORT OF MAJORITY.

IN ASSEMBLY, *January 31, 1855.*

Mr. Ramsey, from the committee on privileges and elections, to which was referred the petition of Andrew S. Warner, claiming the seat in the Assembly, occupied by Jacob M. Selden, submitted a majority report as follows, to wit:

REPORT OF THE MAJORITY AND OF THE MINORITY OF THE COMMITTEE ON PRIVILEGES AND ELECTIONS ON THE PETITION OF ANDREW S. WARNER, CLAIMING THE SEAT IN ASSEMBLY OCCUPIED BY JACOB M. SELDEN.

The committee on privileges and elections, to which was referred the petition of Andrew S. Warner, claiming the seat in the Assembly occupied by Jacob M. Selden, from the second Assembly district, in the county of Oswego, report:

That they have had the same, together with the proofs and allegations of the parties, under consideration, and that from such proofs and allegations they find the following facts:

That the towns of Amboy, Mexico and Williamstown are included in, and form a part of the second Assembly district in Oswego county. That Andrew S. Warner and Jacob M. Selden were candidates for the office of member of Assembly at the last general election. That as appears from the tabular statement hereto annexed, marked exhibit "A.", Jacob M. Selden received one thousand four hundred and forty-eight votes for said office and Andrew S. Warner, the contestant, as also appears by said exhibit "A.", received one thousand four hundred and forty-four votes for said office, in said second Assembly district.

Your committee find by the evidence before them, that the inspectors of election in the town of Amboy were led into a mistake

in the canvass of the votes for member of Assembly in said town; whereby two votes cast for Andrew S. Warner were, by said inspectors, counted for and allowed to Jacob M. Selden. For a full explanation or account of this branch of the case, reference is made to the testimony of Adin H. Porter, Delos Randall, Robert Wilson, James T. Young, Chauncey S. Sage and W. J. Godfrey, herewith submitted.

Your committee also find by the evidence, that in the town of Mexico, in said Assembly district, two minors, to wit, Richard R. Jones and Charles W. Brown, each voted in said town of Mexico at the last general election for member of Assembly, and that they, and each of them, voted for Jacob M. Selden for said office. Reference is made to the testimony of said Richard R. Jones and Charles W. Brown, also herewith submitted.

Your committee also find by the evidence that one Napoleon B. Peck voted at the last general election in the town of Amboy, in Oswego county, for Jacob M. Selden, for the office of member of Assembly. That said N. B. Peck had resided in the county of Oswego, only from about the twentieth day of October last. Reference is made to the evidence of Smith Parks, herewith submitted.

The committee also find by the evidence in this case that in the town of Sandy Creek, in said second Assembly district in Oswego county, one ballot was counted for and allowed to Jacob M. Selden for member of Assembly, described in the evidence as follows, to wit: "It was a printed ballot for a Mr. Devendorf, whose name had been erased, and between the names so erased and the words '*for member of Assembly,*' was written in pencil as follows: 'J.' (a capital letter,) 'se,' in small letters."

Reference is made to the evidence of Orin R. Earl and Horace Scripture, herewith submitted.

The committee also find by the evidence in the case, that in the town of Amboy there were cast in all one hundred and ninety-one votes for member of Assembly. That by an error of the board (how induced the committee are not advised) the footing of the poll list

for member of Assembly was assumed to be one hundred and ninety-four instead of one hundred and ninety-one. That before canvassing the Assembly tickets finally, the inspectors opened the judiciary box, and among the judiciary ballots they found two Assembly tickets for Jacob M. Selden. That the inspectors put the two Assembly tickets aforesaid with the rest, and then on counting found they had one hundred and ninety ballots for member of Assembly, which, upon the (erroneous) assumption that they wanted one hundred and ninety-four, made an excess of two votes.

That the inspectors then drew from the Assembly ballots one ballot for Andrew S. Warner, and one ballot for a Mr. Whitney, and destroyed them. That the canvass then proceeded with the one hundred and ninety-four ballots, with following result:

For Whitney	65
Jacob M. Selden	59
Andrew S. Warner	44
— Devendorf	26
<hr/>	
Aggregate	194
<hr/>	

Reference is made to the testimony of Adin H. Foster, Delos Randall, Robert Wilson, and also to the original poll list, marked exhibit "B," herewith returned.

The committee refer the House to the testimony of Caleb Carr, Josiah F. Selden, Dwight Comstock, Peter H. Morrison, in relation to a vote alleged to have been cast in the town of Williamstown, and counted for and allowed to Andrew S. Warner. The committee are not fully satisfied upon the point involved therein, and make no report thereon.

The committee also herewith submit the petition of Andrew S. Warner, contestant, marked exhibit "C," and also the specifications made by said Warner, and served on said Selden, as appears by an

affidavit thereof herewith returned, and all the allegations and proofs of the parties, in order that the House may the better judge of the correctness of the conclusions to which your committee have come in the premises.

From all the proofs and allegations of the parties, your committee conclude that the inspectors erred in counting for Jacob M. Selden, the two ballots found in the judiciary box, there being an excess of Assembly votes without them.

That the inspectors erred in destroying a ballot belonging to Andrew S. Warner, which was drawn out after the two ballots in the judiciary box had been added to the Assembly ballots.

That the two ballots cast for Jacob M. Selden in the town of Mexico, by Richard R. Jones, and Charles W. Brown, minors, should not be allowed to and counted for Jacob M. Selden.

That the ballot cast for Jacob M. Selden, in the town of Amboy, by Napoleon B. Peck, should not be allowed to and counted for Jacob M. Selden.

That the inspectors erred in allowing to Jacob M. Selden a defective ballot, cast in the town of Sandy Creek, above described.

It therefore appears from the foregoing that the seat now held by Jacob M. Selden, from the second Assembly district, in the county of Oswego, belongs to Andrew S. Warner, the contestant, by a majority of seven votes, and your committee therefore recommend for the consideration and adoption of this House, the following resolution, to wit:

Resolved, That Jacob M. Selden, who now holds the certificate of election, and occupies the seat as member of Assembly from the second Assembly district in the county of Oswego, is not entitled to the same.

Resolved, That Andrew S. Warner, the contestant for the seat, as member of Assembly from the second assembly district in the county of Oswego, has established his title thereto, and that he is hereby declared the member elect from said district, and that the

oath of office be duly administered to him upon his presenting himself for that purpose.

All of which your committee respectfully report.

J. H. RAMSEY.

WM. B. WOODEN.

MOSES EAMES.

Assembly Document, 1855, vol. 2, No. 37.

See exhibits, testimony, &c., following report, pages 5 to 24.

See also Assembly Document, 1855, vol. 2, No. 59, pages 1 to 34.

Mr. Ramsey moved that the report be laid upon the table and printed.

Mr. Speaker put the question, whether the House would agree to the said motion of Mr. Ramsey, and it was determined in the affirmative.

MINORITY REPORT.

Mr. Wager, from the minority committee on privileges and elections, to which was referred the petition of Andrew S. Warner, claiming the seat in the Assembly, by Jacob M. Selden, reported in writing, protesting against the action of the majority as follows:

REPORT OF THE MINORITY OF THE COMMITTEE ON PRIVILEGE AND ELECTIONS ON THE PETITION OF ANDREW S. WARNER.

The minority of the committee on privileges and elections present the following report:

The undersigned are unwilling to agree to the report of the majority from this committee in these particulars. They cannot find two votes in the town of Amboy, in the county of Oswego, were cast for Andrew S. Warner and allowed to Jacob M. Selden.

The inspectors of the election were both sworn to perform that duty in accordance with law, and in the absence of anything to the contrary, they are presumed to do so; but this is not left to presumption, both of the inspectors from that town were sworn, and

negative any such idea, which to our minds is conclusive that the county canvass and returns correspond with the facts.

It is true that one of the clerks at that poll testified that two votes for Warner were found in Selden's pile while counting, but we think no conclusion can be drawn from this language, even that would justify us in saying that those votes were not allowed to Andrew S. Warner; in truth, the preponderance of the testimony is clearly the other way, and as no one has lisped during the whole investigation that any fraud was practiced by any person, and as this was no part of the duty of the clerk, we must say that the inspectors performed their duty correctly.

We are strengthened in this conclusion when the inspectors, or one of them, testified that he is politically hostile to Mr. Selden, and cast his vote at the election for Mr. Warner.

It is proved by Richard R. Jones, that his brother, John C. Jones, a minor, voted at the last election; that a ballot containing the name of Jacob M. Selden was handed to him, but whether he had any other ballots or whether he *actually* voted for Selden the witness could not tell us positively, and the undersigned cannot believe that the sitting member should be prejudiced by such evidence.

Charles W. Brown swears that he was a minor and voted in the town of Mexico, Oswego county, at the last election for Jacob M. Selden, no challenge was interposed, and the conclusion therefore is that without any bad faith upon the part of the inspectors of elections of that town, or of any of the bystanders, this vote was received; yet the undersigned believe that it would be highly improper in such isolated cases, and when no suspicions are thrown around the action of the board of inspectors of election in receiving such vote, to go behind the ballot-box.

If in such case any judgment is to be visited upon the guilty party, the person who voted knowing that he was not entitled to do so should be that party; the rights of innocent parties should not

be prejudiced; the law provides ample remedy in such cases for the punishment of the offender, without any detriment to others.

The majority have found that in the town of Amboy, one Napoleon B. Peck voted at the last election and that he had not been a resident of the town a sufficient length of time to entitle him to vote for member of Assembly in that town. There was conflicting evidence upon this point before the committee. Some gave evidence that they believed he had been a resident a sufficient length of time; others that he had resided in the town for several months.

Smith Park, who is the strongest witness for the contestant, upon this question of residence, testifies that he moved Peck's wife and child from Camden, Oneida county, to the town of Amboy, on or about the 20th day of October last. This witness also testifies that he gave Peck a ballot at the election, and did not know but that he had been in the county of Oswego, four months. He also swears that this question of residence of Peck was submitted to the board of inspectors, and upon examination, they decided to receive the vote of Mr. Peck. The undersigned deem this action and decision of the inspectors conclusive upon this committee; it is a judgment in favor of the legality of the vote, and where there is conflicting evidence, it is conclusive.

For whom Mr. Peck voted, is by no means *absolutely* certain; and it would be a dangerous doctrine to over-ride a majority of the voters in the second Assembly district, of the county of Oswego, by inference, and without positive proof.

In Sandy Creek, it is proved that a ballot was allowed to Jacob M. Selden, by the inspectors, which was partly defective, having on it the name of "Jacob M. Sel," and the inspectors not doubting the intention of the voter, gave it in the count to Jacob M. Selden. But in case this should not be allowed to him by this committee, it does not benefit Mr. Warner, when we take into consideration, that in the town of Williamstown, a vote with simply the name "Warner" upon it, was allowed by the inspectors of that town, to Andrew S. Warner.

There is an ambiguity about the footing of the poll list of the town of Amboy, and the number of ballots cast, but all agree about the perfect good faith in which all this business was transacted, and the result of the canvass cannot be affected by this ambiguity; for if the poll list contains three votes less than the number of ballots cast, no one can tell from whom those votes should be deducted, and the majority claim nothing on this point by their answer to the protest.

The undersigned would call the attention of the House to the fact that the figures and footings given, are not correctly printed; the footing is very material to this investigation.

As has already been stated by the undersigned, there has been no evidence adduced, or any imputations cast upon the perfect good faith and absence of any fraud, or attempted fraud, in any part of the Assembly district, from which Mr. Selden is sent; and your committee cannot discover facts enough to justify them in going behind the ballot-boxes, and the certificate entitling Jacob M. Selden to a seat as a member of this House, and placing another in his place, over a majority of electors of that district, and beg leave to recommend the adoption of the following resolution:

Resolved, That the prayer of the petitioner, Andrew S. Warner, claiming the seat in this House, now occupied by the Hon. Jacob M. Selden, be denied.

A. WAGER.

P. C. WARD.

Assembly Chamber, *February 1st*, 1855.

MINORITY REPORT.

The undersigned, a minority of the standing committee upon privileges and elections, beg leave to present this their *protest* to the action of the majority of this committee, in the case of the contested seat of Jacob M. Selden, a member of this House from the second Assembly district of the county of Oswego, in the following particulars:

1st. That it was the understanding upon the part of Mr. Selden and this committee, that he should be allowed a reasonable time to

procure such witnesses and testimony as he might deem material, to rebut and disprove the allegations and evidence produced against him. That upon such understanding the investigation was continued, and a number of witnesses examined by this committee, until Saturday evening last, when, for the first time, Mr. Selden was informed by a majority of this committee that he would not be allowed further time to procure any witnesses, to disprove the allegations given in evidence against him.

That yesterday afternoon Mr. Selden appeared before said committee, and made an affidavit of the materiality of certain witnesses named by him (some of whom were mentioned in the specifications of the contestant), and that the committee could not decide properly upon his case until such witnesses were produced, and requesting a postponement for one week to procure their attendance, which was denied by a majority of this committee.

The undersigned, believing that such action upon the part of this committee does not evince that spirit of justice and indulgence that a fair and honorable investigation of his case requires, and believing also that strict technical rules, such as characterize legal proceedings, should not be enforced by this committee, but that substantial justice should be sought, so that not only the sitting member and the contestant may be fairly dealt with, but that absent parties, the electors of that Assembly district, may be protected in their rights and preferences. And believing as we do that the evidence named by Mr. Selden would have for its accomplishment these ends, we *protest* against such action of a majority of this committee, in refusing to allow an opportunity to procure such evidence.

The undersigned would further state, that during this investigation, which has been very tedious, they have been in attendance with the committee at all suitable hours; that when said committee have been sitting, and the hour for the meeting of this House arrived, the undersigned have notified the chairman of this committee that this House was in session, and requested that the in-

vestigation be adjourned, so that this committee might attend in their places as members in this House; that upon such request and notification a majority of this committee refused to adjourn, and that the undersigned thereupon, as they conceived their bounden duty, left said committee and attended the session of this House, while a majority of said committee remained in the committee room, receiving evidence in this matter.

The undersigned believing that such action was in direct violation of all parliamentary rules by which this body is governed, and in opposition to the duty of members thereof, most earnestly and solemnly *protest* against such action, and submit that evidence, so taken in the absence of the undersigned, or either of them, should be retaken by the committee, so that they may be able to decide this contest with all the facts before them; and that committees may understand that they are not independent of, but subservient to the rules governing this House.

In view of the facts above set forth, and for the promotion of justice between the parties in this matter, the undersigned beg leave to offer the following resolution:

Resolved, That the matter of the petition of Andrew S. Warner be referred back to the committee upon privileges and elections to take the evidence and testimony offered by Jacob M. Selden, and rejected by them; and that for the purpose of procuring such evidence said Selden be allowed one week's time to produce it before that committee; and that such evidence as was taken during the session of this House, and in violation of its rules, be retaken by such committee.

Respectfully submitted.

A. WAGER.

P. C. WARD.

ASSEMBLY CHAMBER, Jan. 31, 1855.

IN THE MATTER OF THE CONTESTED SEAT OF JACOB M. SELDEN.

The majority of the standing committee on privileges and elections, in answer to the protest of the minority, deem it proper to make a statement of the following facts in relation to the matter:

The same day the committee was announced (4th Jan., inst.), the parties appeared before them with a view of settling the manner of taking the testimony. The parties preferred having the witnesses attend before the committee personally, and the time for the hearing was, by consent, fixed for the 15th inst., at four o'clock P. M. The chairman, at the time, stated to both parties specifications should be made and served, that each might know precisely what he had to meet.

On the 15th, Mr. Warner alone appeared and stated that Mr. Selden complained of being unwell, and wanted the matter postponed; it was accordingly postponed to the 23d inst., at four o'clock P. M. Subpœnas were issued, and on the last mentioned day the parties appeared with their counsel and witnesses before the committee. The specifications were again spoken of, and it was stated that they had been served on part of Mr. Warner; a copy, which was produced, annexed. The attention of Mr. Selden was again called to the necessity of preparing specifications on his part if he intended to show irregularities on the part of Mr. Warner's vote, not in issue by the petition or specifications served. No specifications were made or served on the part of Mr. Selden to the knowledge of the committee.

The parties then proceeded to take the testimony, commencing with the witnesses on part of Mr. Warner in support of the points made in his petition and specifications. Testimony was then adduced on the part of Mr. Selden in answer, and in reply other testimony on part of Mr. Warner, until it was closed on Saturday, the 27th inst. Mr. Selden then asked further time to procure testimony, and stated he thought if he could have time to look about he could find illegal votes had been given for Mr. Warner.

The committee consulted together, and were unanimous in the opinion, it was improper to keep the case open for such a purpose, as that would get up new issues, and there would be no end to the examination during the session, but stated they were willing to give him further time to obtain witnesses to explain or rebut the testimony upon the other side, if he would name the witnesses and

specify the points upon which he wished to call them. Mr. Selden then stated, he wanted to give evidence in relation to the minors who voted in Amboy. The committee stated they were with him upon that point, that the votes would not be allowed against him. He then stated he wanted to explain the discrepancy between the poll list of Amboy, from which it appeared there was one hundred and ninety-one votes for Assembly, and the number one hundred and ninety-four returned by the canvassers. The committee were also unanimous, it was not material, as the discrepancy of three votes was not claimed against him, nor would they be allowed. Mr. Selden was then asked if there was any other point upon which he wanted further testimony, and he distinctly stated there was not. The chairman then stated the evidence was closed, and inquired of the parties if they wished to argue the case before the committee. Mr. Selden stated he wanted Mr. Williams to argue the case on his part, who was then absent and would not return before Tuesday or Wednesday of the next week. The case was then postponed for argument until the 30th inst., at 3 o'clock p. m., when the parties appeared and the application was made on part of Mr. Selden, to open the case for further testimony and an adjournment asked of one week, to procure the attendance of witnesses, which a majority of the committee denied, when the counsel for Mr. Selden stated they abandoned the case before the committee, and would take it into the House.

The committee then adjourned until seven o'clock the same evening, to examine the testimony, and agree upon a report. They met (except Mr. Ward), and made some examination of the matter. Mr. Wager did not agree with the majority, and said there would have to be a minority report. The matter was adjourned until the next morning at nine o'clock, when the committee again met (except Mr. Ward), and the matter further discussed and the majority report completed. The chairman stated to Mr. Wager, if the minority desired it, he would move the majority report lie on the table until they could have time to bring in their report. The

committee then separated, and went into the House, without any notice of the protest until presented.

Your committee further state that no testimony was taken while the House was in session, except to complete the examination of one witness, which was at the request of both parties; after that, upon the objection of a member of the committee, the examination was postponed during the sessions of the House, although according to parliamentary usage (it being a question of privilege), they would have been justified in sitting during the sessions of the House.

The undersigned are not conscious that any action has been taken on their part not consistent with a spirit of justice, or that they have not granted every indulgence necessary to a fair and an honorable investigation of the case. They have not been governed by technical rules, but endeavored to get at what was the right and justice of the case, aside from every other consideration; all of which is respectfully submitted.

J. H. RAMSEY.

WM. B. WOODEN.

MOSES EAMES.

Assembly Documents, 1855, No. 37.

(See testimony, pages 5 to 24, Assembly Documents, 1855, No. 37.)

Mr. Rickerson moved that the communication of the minority of the committee be printed.

Mr. Stevens moved to amend, by adding, "and that the answer of the majority be also printed, when presented to the House."

Mr. Speaker then put the question whether the House would agree to the said motion as amended, and it was determined in the affirmative.

Assembly Journal, 1855, volume 2, pages 247 and 248.

CONSIDERATION OF REPORTS.

IN ASSEMBLY, *February 20, 1855.*

Mr. Ramsey moved to take from the table the majority and minority reports on the contested election of Jacob M. Selden.

Mr. Speaker put the question whether the House would agree to the said motion of Mr. Ramsey, and it was determined in the affirmative.

Mr. Ramsey moved the adoption of resolutions reported by the majority of the committee, said resolutions being in the words following, to wit:

Resolved, That Jacob M. Selden, who holds the certificate of election and occupies the seat as member of Assembly from the second Assembly district from the county of Oswego, is not entitled to the same.

Resolved, That Andrew S. Warner, the contestant for the seat as member of Assembly from the second Assembly district in the county of Oswego, has established his title thereto, and that he is hereby declared the member elect from said district, and that the oath of office be duly administered to him, upon his presenting himself for that purpose.

Mr. Wager moved to amend by striking out all after the word "resolved," and insert as follows:

That the matter of the petition of Andrew S. Warner be referred back to the committee on privileges and elections, to take the evidence and testimony offered by Jacob M. Selden, and rejected by them; and that for the purpose of procuring such evidence, said Selden be allowed one week's time to produce it before the committee; and that such evidence as was taken during the session of this House, and in violation of its rules, be retaken by said committee.

Mr. Lamport moved to lay the whole subject on the table.

Mr. Speaker put the question, whether the House would agree to the said motion of Mr. Lamport, and it was determined in the negative.

Mr. Rhodes moved that the subject be referred to the committee of the whole.

The hour of three-quarters past one o'clock having arrived, the Speaker announced that the House would take a recess until seven o'clock P. M.

Assembly Journal, 1855, vol. 2, page 395.

CONSIDERATION OF REPORTS RESUMED.

IN ASSEMBLY, *March 8, 1855.*

Mr. Ramsey moved to take up the subject of the contested election case in Oswego.

Mr. Speaker put the question, whether the House would agree to the said motion of Mr. Ramsey, and it was determined in the affirmative.

Mr. Speaker stated the pending question, as being the resolution of Mr. Wager, that the matter be referred back to the committee on privileges and elections, to allow Mr. Selden further time.

Mr. Boynton moved the previous question.

Mr. Munday moved to lay the motion for the previous question on the table.

Mr. Speaker put the question whether the House would agree to the said motion of Mr. Munday, and it was determined in the negative.

Ayes, 40. Noes, 66.

Mr. Speaker put the question whether the House would agree to second the call for the previous question, and it was determined in the affirmative.

ANDREW S. WARNER AWARDED THE SEAT.

Mr. Speaker put the question. "Shall the main question be now put," it being the resolution of the majority of the committee on privileges and elections, that Jacob S. Selden is not, and that Andrew S. Warner is entitled to the seat now held by Jacob M. Selden, and it was determined in the affirmative.

Ayes, 67. Noes, 39.

Mr. O'Keefe called for a division of the question.

Mr. Speaker put the question on the first resolution, which reads as follows:

"*Resolved*, That Jacob M. Selden, who now holds the certificate of election, and occupies the seat as member of Assembly from the second Assembly district in the county of Oswego, is not entitled to the same," and it was determined in the affirmative.

Ayes, 67. Noes, 40.

ANDREW S. WARNER AWARDED THE SEAT.

Mr. Speaker then put the question on the second resolution, which reads as follows:

"Resolved, That Andrew S. Warner, the contestant for the seat as member of Assembly from the second Assembly district, from the county of Oswego, has established his title thereto, and that he is hereby declared the member elect from said district, and that the oath of office be duly administered to him upon his presenting himself for that purpose," and it was determined in the affirmative.

Ayes, 69. Noes, 38.

MR. WARNER TAKES THE OATH OF OFFICE.

Mr. Andrew S. Warner then appeared at the clerk's desk and took and subscribed the Constitutional oath of office.

See Assembly Journal, 1855, vol. 2, pages 597, 598, 599 and 600.

Case of Augustus H. Ivans and David S. Mills.

FIRST DISTRICT, KINGS COUNTY — PROTEST OF DAVID S. MILLS,
PRESENTED.

IN ASSEMBLY, *January 2, 1855.*

Mr. Rhodes presented the protest of David S. Mills, against a seat being given to Caleb Augustus Ivans, as a member of Assembly from the first district, of Kings county, which was read and referred to the committee on privileges and elections.

Assembly Journal, 1855, vol. 1, page 34.

REPORT PRESENTED.

IN ASSEMBLY, *January 31, 1855.*

Mr. Ramsey, from the committee on privileges and elections, to which was referred the petition of David S. Mills, claiming the seat in the Assembly occupied by Augustus H. Ivans, submitted for the consideration of the House the following report:

REPORT OF THE COMMITTEE ON PRIVILEGES AND ELECTIONS ON
THE PETITION OF DAVID S. MILLS.

The committee on privileges and elections, to which was referred the petition of David S. Mills, claiming the seat in the Assembly occupied by Augustus H. Ivans, from the first Assembly district in the county of Kings, report: That they have had the same, together with the proofs and allegations of the parties under consideration, and that from such proofs and allegations they find the following facts:

That in the first Assembly district in the county of Kings, Augustus H. Ivans received, on the seventh day of November last, three thousand nine hundred and twelve votes and David S. Mills, the contestant, received one thousand eight hundred and twenty-one votes.

There appears to be no disagreement between the parties as to the result of the election above named, or that Augustus H. Ivans, the occupant of the seat, is the person for whom the above number of three thousand nine hundred and twelve votes were intended to be cast, giving him a majority of two thousand and ninety-one over the contestant, David S. Mills. The disagreement on the part of said Mills is, that the name of the occupant of the seat is August Ivins, and not Augustus H. Ivans.

Your committee, after carefully reviewing the testimony submitted by the occupant, and hearing the allegations of the contestant, no testimony being submitted by him, have unanimously come to the conclusion that the occupant, Augustus H. Ivans, is justly entitled to the seat now occupied by him, and, therefore, would respectfully recommend, for the consideration and adoption of this House, the following resolution, to wit:

Resolved, That Augustus H. Ivans, who occupies the seat as member of Assembly from the first Assembly district in the county of Kings, is fully entitled to the same, and the committee be discharged from the further consideration of the subject.

Your committee, however, for the purpose of putting the House

in possession of the proofs and allegations of the parties, in order that it may the better judge of the correctness of the conclusions to which your committee have come in the premises, herewith transmit to your honorable body, the petition and testimony presented for their consideration.

All of which your committee respectfully report.
 Assembly Documents, 1855, No. 46.

AUGUSTUS H. EVANS AWARDED THE SEAT.

Mr. Speaker put the question, whether the House would agree to the said resolution, and it was determined in the affirmative.
 Assembly Journal, 1855, page 247.

Case of John G. Seeley and James Dolan.

FOURTH DISTRICT, NEW YORK CITY — PETITION PRESENTED.

IN ASSEMBLY, *February 2*, 1858.

Mr. Wolford presented the petition of James Dolan, of New York, claiming the seat of John G. Seeley in this House, which was read and referred to the committee on privileges and elections.
 Assembly Journal, 1858, page 152.

IN ASSEMBLY, *March 1*, 1858.

Mr. Godard offered for the consideration of the House, a preamble and resolution in the words following to wit:

Whereas, James A. Dolan, of New York city, has been in attendance upon this House from the commencement of the session to this, for the purpose of obtaining a hearing before this House, touching his right to the seat now held by one John G. Seeley, as a representative of the fourth Assembly district of the city of New York; the right of said Seeley to said seat being denied by said Dolan, on the ground that said Seeley was not a resident of the district which he claims to represent at the last general election nor a voter therein; and said Dolan claims said seat on the ground

that he received the highest number of votes for member of Assembly of said fourth Assembly district aforesaid, that were given to any person who was at the time a resident of said Assembly district, therefore

Resolved, That the committee on privileges and elections be directed forthwith to report to this House what action, if any, they have taken in regard to the matter in controversy between said Dolan and Seeley touching their right to represent said fourth Assembly district in this House.

Debate was had thereon when, ordered that said resolution be laid on the table.

Assembly Journal, 1858, page 364, 365.

IN ASSEMBLY, *March 6, 1858.*

Mr. W. Baldwin offered for the consideration of the House, a resolution in the words following, to wit:

Resolved, That the committee on privileges and elections, be authorized to send for persons and papers acquainted with the facts of the contested election case of Dolan v. Seeley.

Mr. Hall moved to amend the resolution by adding thereto the following:

“ And that the said committee be required to report to this House on Friday next immediately after reading the journal, all the facts in their possession touching the seat of Mr. Seeley, contested by Mr. Dolan.”

Mr. Speaker put the question whether the House would agree to said amendment, and it was determined in the affirmative.

Mr. Speaker then put the question whether the House would agree to said resolution as amended, and it was determined in the affirmative.

Assembly Journal, 1858, page 440.

REPORT OF MAJORITY.

IN ASSEMBLY, *March 17, 1858.*

Mr. Crain, from a majority of the committee on privileges and elections, to which was referred the petition of James A. Dolan,

claiming the seat now occupied by Hon. John G. Seeley reported in writing, as follows:

REPORT OF A MAJORITY OF THE COMMITTEE ON PRIVILEGES AND ELECTIONS, ON THE PETITION OF JAMES A. DOLAN, CLAIMING THE SEAT OCCUPIED BY HON. JOHN G. SEELEY.

Mr. Crain, from a majority of the committee on privileges and elections, to which was referred the petition of James A. Dolan, claiming the seat, now occupied in this House by Hon. John G. Seeley, begs leave, on behalf of the majority of said committee, to submit the following report: The contestant claims the seat now occupied by Mr. Seeley, upon the ground, as he alleges, that he (the contestant) received a majority of the legal votes cast for member of Assembly, in the fourth Assembly district of the city of New York, at the late general election. It is conceded on all sides that Mr. Seeley received at that election a greater number of votes for member of Assembly than the contestant, or any other candidate running for that office; but it is claimed that the votes cast for Seeley were illegal and void, for the reason, as is alleged, that he was not at the time of holding that election, a resident of the said Assembly district. Only two questions, therefore, were presented to the committee, viz.:

1st. Is there anything in the Constitution or laws of this State requiring that a member of Assembly should be, at the time of the election, a resident of the Assembly district from which he is returned?

2d. If such residence is a necessary qualification for holding a seat in this Body, was, or was not, the Hon. John G. Seeley a resident of the Assembly district from which he was returned as member at the time of the late general election?

Both parties have been attended by counsel. The committee requested the counsel for the contestant to cite some authorities tending to show that the electors of an Assembly district could not, in their discretion, elect a resident of another Assembly district

to represent them in this House. The counsel for the contestant has never produced any such authority. The committee, however, to still better satisfy themselves and the House as to the legal question involved, reported through their chairman to the House, a resolution calling upon the Attorney-General for his opinion as to this point. This resolution was adopted, and in pursuance thereof, the Attorney-General has transmitted his opinion to this House, in which he holds that there is nothing in the Constitution or laws of the State, requiring that a member of the Assembly should be a resident of the Assembly district from which he is returned at the time of his election. In that opinion the committee concur.

Upon this question of fact involved, to wit: As to whether Mr. Seeley was or was not a resident of the fourth Assembly district, at the time of the late general election, the committee have taken the testimony of many witnesses. Although the committee regard this evidence as entirely immaterial in the decision of the case, they have, nevertheless, thought it proper, under the circumstances, to submit the testimony to the House, together with this report. The committee are of opinion that the evidence abundantly establishes that Mr. Seeley was a resident of the fourth Assembly district of the city of New York at the time of the late election for members of Assembly, within the meaning of the term "resident," as used in all statutes upon the subject of elections and the qualifications of voters. In the opinion of the committee, the Hon. John G. Seeley is legally entitled to the seat he now occupies in this House, and that the contestant has no claim whatever to said seat.

The committee therefore submit the following resolution, to wit:

Resolved, That Hon. John G. Seeley is entitled to the seat now occupied by him in this House, and that James A. Dolan is not entitled to said seat.

Assembly Documents, 1858, No. 96.

Assembly Journal, 1858, page 532.

MINORITY REPORT.

IN ASSEMBLY, *March 17, 1858.*

Mr. Mather, from a minority of the committee on privileges and elections, to which was referred the petition of James Dolan, claiming the seat now occupied by the Hon. John G. Seeley reported in writing, as follows:

REPORT OF A MINORITY OF THE COMMITTEE ON PRIVILEGES AND ELECTIONS, ON THE PETITION OF JAMES A. DOLAN, CLAIMING THE SEAT OCCUPIED BY HON. JOHN G. SEELEY.

The minority of the committee on privileges and elections, to which was referred the petition of James A. Dolan, contesting the seat of John G. Seeley, as member of Assembly, representing the fourth Assembly district of New York, beg leave respectfully to report, that they have investigated the facts connected with the claim of the aforesaid James A. Dolan, together with matters relevant to the returns of elections in this disputed case, by the examination of witnesses, many of whom resided in said district, and cognizant of the said facts. The evidence shows that said John G. Seeley and James A. Dolan and another person, were candidates for the office of Assembly, in the fourth Assembly district in New York, at the last general election. That said Seeley received a plurality of the votes in said district; that said James A. Dolan received the next greater number of votes in said district; that said Dolan was a resident and voter in said district, and had been for eight or ten years last past; and that said Seeley's family are residents of the county of Washington, about two hundred miles distant from New York.

From the foregoing facts, the minority have arrived at the conclusion that the aforesaid John G. Seeley is not, legally, a member of this Assembly, and that his seat should be vacated in favor of the aforesaid James A. Dolan, this conclusion being based upon the following facts, as proven:

1. That the said John G. Seeley is not and was not, at the period

of his alleged election, a resident of the fourth Assembly district in the city of New York. That he removed his family from said city two or three years since to the county of Washington, and they have made it their permanent residence, and have not since resided in the city of New York.

2. That the residence of a married man (by the decision of our courts) is where his family resides; therefore, Mr. Seeley is a resident of Washington county, and not a resident of the county of New York.

Now, the structure of our republican form of government or system depends, for its justice and integrity, upon the representation of certain portions of the State by persons identified with the interests of such portions; and, for this reason, the Constitution has apportioned the entire State into districts, giving to each its proper delegate, in order that through each delegate the local wants and rights of the district should be properly represented in the State Legislature. If it had been of no *importance* that each district should be thus separated and peculiarly represented by its own local citizen, then the Legislature might as well be elected upon a State ticket, and the members taken indiscriminately from any and all sections, and a merchant doing business in New York may be chosen to represent the farming interests of Washington county, or the fishing interests on our lake shores.

But, common sense as well as justice, assures us, that the framers of our State Constitution intended, by their apportionment of representation and enumeration of districts, the object was, that each county or other district should have its rights supported, and its wants cared for in the Legislature, through a delegate whose legal citizenship was in their midst and whose interests were identified with their own.

From the evidence, we deem John G. Seeley a non-resident of said Assembly district; therefore, if a non-resident of the district or county may claim a seat in the Assembly, so may a non-resident of the State, or even an alien, chosen through ignorance or inat-

tention upon the part of the voters of such district, presume upon his certificate of election, to claim a seat and assist in enacting the laws of the State, wherein he is not eligible to exercise the primary privilege of citizenship.

Now the said John G. Seeley, so far as regards the fourth Assembly district in the city of New York is concerned, was, and is, to all intent and purpose, an alien; not being eligible to exercise the primary right to vote, even for himself, in said district; or, had he thus voted, he would have been liable to be prosecuted and punished, under the law for illegal voting.

3. In view of the facts in the case, we recommend the speedy adjustment of the same, in order to furnish a precedent for action in cases of a similar nature that may hereafter arise. And for that purpose the minority of your committee respectfully ask the adoption of the following resolution, to wit:

Resolved, That the seat now occupied by John G. Seeley as a member of Assembly from the fourth Assembly district of the city and county of New York, rightfully belongs to James A. Dolan; said Seeley, being a non-resident of the said district, is hereby adjudged to be ineligible to represent said district, and that the said James A. Dolan, the claimant, be duly installed in his rights as member of this Assembly, from the fourth Assembly district in the city of New York.

(Signed.)

JOHN MATHER.

Assembly Documents, 1858, No. 97.

See Assembly Documents, 1858, No. 101, pages 1 to 8 for evidence, &c.

Assembly Journal, 1858, page 532.

Case of James Frazee and Sidney H. Cook.**FIRST DISTRICT, ONONDAGA COUNTY — PETITION PRESENTED.****IN ASSEMBLY, *February 3, 1858.***

Mr. Speaker presented the petition of Sidney H. Cook, claiming to be elected member of Assembly from the first Assembly district in Onondaga county, which was read and referred to the committee on privileges and elections.

Assembly Journal, 1858, page 163.

MAJORITY REPORT.**IN ASSEMBLY, *March 10, 1858.***

Mr. Crain, from the majority of the committee on privileges and elections, to which was referred the petition of Sidney H. Cook, claiming to be entitled to the seat in the House now occupied by the Hon. James Frazee, reported, in writing, as follows:

**REPORT FROM THE MAJORITY OF THE COMMITTEE ON PRIVILEGES
AND ELECTIONS RELATIVE TO THE SEAT NOW OCCUPIED BY THE
HON. JAMES FRAZEE.**

Mr. Crain, from the committee on privileges and elections, to which was referred the petition of Sidney H. Cook, claiming the seat in the House now occupied by the Hon. James Frazee, beg leave, on behalf of the majority of said committee, to submit the following report:

The committee have entered upon this investigation with a desire to determine impartially the claims of the contestants, and without any hesitation arising from doubt as to their power in the premises; to fully impress the House with a conviction of their undoubted constitutional power to take up the case, investigate all the facts, irrespective of returns and certificates of the official canvass. The committee invite the attention of the House to section ten of the third article of the Constitution, which provides that "each House shall

determine the rules of its own proceedings, and be the judge of the election returns and qualifications of its own members." This provision invests the House with full power over the subject, and authorizes it to go back of returns and certificates, and investigate "the election" of its members. It is a power granted by the supreme law of the State, and rises above all official certificates and returns, and could not be subverted even by a statute law. If further authority is needed, the committee would also invite the attention of the House to an adjudication, where the power of the Assembly and of the court tribunals to go back of certificates and returns of canvassers is discussed. In the case of *Benton v. Vail*, reported in 20th Wendell, page 16, the court says: "But to hold it (the official canvass) conclusive in this proceeding, would be nothing less than saying that the will of the electors, plainly expressed in the forms prescribed by law, may be utterly defeated by the negligence, mistake or fraud of those who are appointed to register the results of an election. But if we cannot look beyond the certificate for purposes of correcting an error produced by negligence or mistake, we cannot interfere in a case of fraudulent misconduct on the part of the board of canvassers. In those legislative bodies which have the power to judge of their own members, it is a settled practice, when the right of a sitting member is called in question, to look beyond the certificate of the returning officers; and I think a court and jury, with better means of arriving at truth, may pursue the same course."

It appears from the certificate of the board of county canvassers, given in evidence before the committee, that from the returns of the election district inspectors for the first Assembly district of the county of Onondaga, certified to said board, that Sidney H. Cook, the contestant, received at the election held on the 3d day of November last, one thousand nine hundred and nineteen votes, and James Frazee one thousand nine hundred and twenty votes; from which, it will be seen that the present incumbent was declared elected by one majority. The contestant claims that he actually

received ballots which were not allowed him by the district inspectors in the canvass; that ballots legally and fairly cast for him, were destroyed and not counted, and that illegal ballots cast for Frazee, the present incumbent, were allowed to said Frazee in the canvass. The first irregularity of this kind brought to the notice of the committee, is alleged to have occurred in the first election district of the town of Spafford. It is proved to the satisfaction of the committee, by the testimony of John L. Mason, Daniel Wallis and H. Linus Darling, that during the canvass of the Assembly votes in this election district, Isaac Harris, one of the inspectors, found among the ballots which had been taken from the Assembly box, two double ballots for James Frazee for Assembly, which were separated and counted for said Frazee; that the ballots for Assemblyman exceeded the poll list by two in number; and that upon his mentioning the fact of having found the duplicated ballots to the other inspectors, the whole of the Assembly ballots, (including the double ballots,) were thrown back into the box, and two ballots for Sidney H. Cook for member of Assembly, were drawn out and destroyed. It seems that the ballots unopened had been twice or three times carefully counted, and compared with the poll list, and found to agree; and that on three several counts, the duplicated ballots had not been detected. The duplicated ballots were found by Harris on opening and counting the ballots.

The evidence is contradictory as to whether Harris called the attention of the board to the fact of the duplicated ballots, at the time he discovered them. But it is clear that the board took no action upon the subject until after a count was made of the opened ballots, and there was found to be an excess of votes over the poll list. This excess was found to be two over the poll list, and was found in the pile of which Harris had charge.

The statute upon the subject is as follows: (Section thirty-seven, of article four, of the act entitled "An act respecting elections, other than for militia and town officers," passed April 5th, 1842.) "Each box being opened, the ballots contained therein shall be taken out

and counted unopened, except so far as to ascertain that each ballot is single, and if two or more ballots shall be found so folded together as to present the appearance of a single ballot, they shall be destroyed, if the whole number of ballots exceed the whole number of votes, and not otherwise."

The question now arises, ought the inspectors to have destroyed these joint or double ballots, under the preceding section of the statute? The committee are clearly of the opinion that they should have done so. The committee are of opinion that this statute requires the destruction of all double ballots found in the box, either upon a count of opened or unopened ballots, where it is found that the number of ballots exceeds the number called for by the poll list. It is broad and general in its provisions, and confined to no specific count. To make a ballot illegal under this section, so as to make it incumbent upon the inspectors to destroy it, it is only necessary, in the language of the statute, 1st, "That two or more ballots should be found so folded together as to present the appearance of a single ballot;" and 2d, "That the whole number of ballots exceed the whole number of votes on the poll list." That these double ballots presented the appearance of single ballots is clearly established by the fact that they had been subjected to two or three careful counts unopened, in order, in the language of the statute, to "ascertain that each ballot is single," and had eluded the vigilance of the inspectors. Another fact is undisputed, that the counting of these joint ballots produced the excess of votes over the poll list. When these facts are established in a given case, the statute is peremptory, "they (the ballots) shall be destroyed."

It was argued before the committee, by counsel for Mr. Frazee, that it does not clearly appear, from the evidence, that Harris called the attention of the other inspectors to the double ballots, until after they were mingled with the common pile, and that the board could not legally reject those ballots after they had been so mingled. The committee are of the opinion that the transaction

was just as illegal as though the whole board had been cognizant of the fact, and the double ballots been counted by their direction.

It is well known that it is customary in the canvass of votes for each inspector to count a certain portion of ballots separately, and often the clerks participate in the count as a matter of convenience. It is undoubtedly the duty of an officer, when discovering a double ballot, to lay it aside, to be disposed of upon a comparison of the ballots with the poll list, so that if an excess be found over the poll list it can be destroyed; and it is undoubtedly the further duty of an officer, on discovering such a ballot, to call the attention of the board to the fact at the time of the discovery. His omission, however, to lay aside the ballot, or call the attention of the board to it at the time it is discovered to be a double ballot, does not legalize the ballot. The doctrine cannot be entertained that because the inspector has concealed the fact of having found a double ballot, that a candidate can thereby be subjected to the hazard of a draw. If the board in this case had had knowledge of the double ballots found by Harris, and decided to count them for Frazee, it would have been a palpable violation of the statute above quoted.

Is it any the less a violation of the statute that it was done by a single inspector. If so, each inspector in opening ballots may discover double ballots and conceal them, so as to produce an excess of ballots over the poll list, and subject the candidate to the hazard of a draw. The committee believe, in this case, that the conduct of Harris was illegal; and while they do not feel called upon to impute to him any intentional wrong, it is clear he was guilty of a neglect of duty and a violation of the statute. The section of the statute under which the inspectors proceeded to draw in this case, is as follows:

“Section 41. If, after having opened or canvassed the ballots, it should be found that the whole number of them exceeds the whole number of votes entered on the poll list, the inspectors shall return all the ballots into the box, and shall thoroughly mingle the

same; and one of the inspectors, to be designated by the board, shall publicly draw out of such box, without seeing the ballots contained therein, so many of such ballots as shall be equal to the excess, which shall be forthwith destroyed."

The committee believe that this statute has no application to an excess produced by duplicated ballots, but applies to a mistake in the count of unopened ballots, or in the manner of keeping or footing up the poll list. If the duplicated ballots for Frazee had been destroyed, the number of votes Frazee received would have been four less than was accorded to him by the inspectors. Restoring to the contestant Cook the two ballots drawn out and destroyed, would have increased his aggregate vote two more than was allowed him by the inspectors, making a difference of six in the canvass, and electing the contestant by five majority.

The second alleged irregularity investigated by the committee was in the second election district in the town of Camillus. It is clearly proven that in this district, in the opening of the Assembly ballots, a joint ballot was found for Cook. The attention of the board was called to this double ballot at the time it was discovered. The double ballot was separated and mingled in the general pile of ballots and counted. On comparing the whole number of ballots with the poll list, there was found to be an excess of one. The board, after mixing the ballots, took out promiscuously from the pile of Cook's ballots two ballots and threw them away, not counting them. The board intended to do, by this act, what was equivalent to a destruction of joint ballots, under section thirty-seven of the statute hereinbefore quoted. This act the committee believe to have been irregular and illegal. Under the statute the board should have destroyed the identical joint ballot. The joint ballot was by the statute illegal and void, and although undestroyed, it would be the duty of the inspectors to reject it in the count, and to restore to Cook the two ballots thrown away. From this it will appear that no wrong was done to Cook by this irregularity on the part of the inspectors. After the destruction of the two ballots

for Cook, it was found upon a count that the number of the ballots fell short one of the number called for by the poll list. There was at this poll found in the school commissioner's box a ballot for Cook for Assemblyman, regularly indorsed, and in all respects a perfect ballot. This ballot was not allowed to Cook. The committee believe it to have been the duty of the inspectors to allow this ballot to Cook, under the following section of the statute:

"Section 38. No ballot properly indorsed, found in a box different from that designated by its indorsement, shall be rejected, but shall be counted in the same manner as if found in the box designated by such indorsement, provided that by the counting of such ballot or ballots it shall not produce an excess of votes over the number of voters as designated on the poll list."

Allowing this vote to Cook would have produced a tie in the election, and Frazee not having obtained a majority of all the Assembly votes in that Assembly district, would not have been entitled to a seat in this House.

The next irregularity brought to the attention of the committee is alleged to have occurred in the first election district of the town of Camillus. Upon canvassing the votes in the judiciary box at this poll it was found that the number of votes contained in that box corresponded with the number called for by the poll list. The inspectors on counting the opened ballots found two Assembly votes for Sidney H. Cook regularly indorsed. By direction of the board, these votes were placed under a candlestick or lamp used by the inspectors. The Assembly votes were next canvassed, and upon several careful counts of unopened ballots, it was found that the number of ballots corresponded with the number called for by the poll list. But on counting the opened Assembly ballots two judiciary ballots regularly indorsed were found in the pile of Assembly ballots, and these two ballots were likewise placed under a lamp or candlestick. The two judiciary ballots thus found were subsequently, as is shown by the evidence, taken from under the candlestick or lamp and counted with the judiciary votes, which made the

number of judiciary ballots correspond with the number called for by the poll list. This was in strict conformity with the requirements of the 38th section of the statute hereinbefore quoted. When the two judiciary ballots found in the Assembly box were taken from the pile of Assembly ballots and counted where they belonged, the Assembly ballots lacked two of the number called for by the poll list, and the law required that the two Assembly votes found as aforesaid in the judiciary box should be counted with the other Assembly votes, and allowed to the contestant Cook. But in the opinion of the committee the proof is irresistible that the inspectors did not count these votes, and they were never allowed for Cook, but were destroyed. The testimony of the inspectors and other persons as to the disposition made of these two Assembly votes is to some extent vague and contradictory, no very distinct recollection as to this point having been retained in the minds of the witnesses. But, in the opinion of the committee, the fact that these votes were never counted or allowed to the contestants, but were destroyed, is established beyond all doubt by records constituting a higher order of evidence than the mere recollection or impressions of witnesses. The written returns of the inspectors to the board of canvassers show that only two hundred and sixty-eight votes were returned for Assemblyman, while the poll list called for two hundred and seventy. Had the two Assembly ballots found in the judiciary box been counted, the return of the inspectors must necessarily have shown two hundred and seventy votes. The committee respectfully submit, that it is impossible in their opinion to reconcile this discrepancy between the returns and the poll list with the idea that these two Assembly votes were ever counted. Had the inspectors performed their duty and counted these votes as by law they were required to do, the contestant Cook would have been elected by a majority of one, independently of the irregularities in the two election districts hereinbefore mentioned.

The committee are therefore of opinion and state as the result of their investigations:

First. That the contestant Sidney H. Cook, was by illegal acts of the inspectors in the first election district of the town of Spafford deprived of two votes cast for him in that district and to which he was legally entitled; and that four votes were allowed to James Frazee in that district to which said Frazee was not entitled.

Second. That by the illegal conduct of the inspectors of the second election district of the town of Camillus, one ballot for the contestant Sidney H. Cook, was rejected, which should have been counted and allowed to said Cook.

Third. That two Assembly ballots in due form of law cast for Sidney H. Cook in the first election district of the town of Camillus, and to which he was legally entitled were, by mistake, overlooked by the inspectors and not counted; and that the said two ballots should have been allowed to the contestant.

Fourth. That Sidney H. Cook was duly elected member of Assembly from the first Assembly district, of the county of Onondaga, at the election held on the 3d day of November, 1857, by a majority of eight votes.

The committee beg leave to accompany this report with the testimony taken before them and to submit to the House the following resolutions:

Resolved, That James Frazee is not entitled to a seat as member of Assembly now occupied by him.

Resolved, That Sidney H. Cook is entitled to the seat as member of Assembly now occupied by James Frazee.

See testimony accompanying said report, pages 9 to 30.
Assembly Documents, 1858, No. 71; Assembly Journal 1858, page 464.

MINORITY REPORT.

IN ASSEMBLY, *March 10, 1858.*

Mr. Mather, from the minority of the committee on privileges and elections, to which was referred the petition of Sidney H. Cook, contesting the right of James Frazee to a seat in this House, as a member of Assembly from the first Assembly district of Onon-

daga county, and claiming that right for himself, reported, in writing, adversely to the prayer of said petitioner:

REPORT FROM THE MINORITY OF THE COMMITTEE ON PRIVILEGES AND
ELECTIONS RELATIVE TO THE SEAT NOW OCCUPIED BY THE HON.
JAMES FRAZEE.

Mr. Mather, from the minority of the committee on privileges and elections, to which was referred the petition of Sidney H. Cook, claiming the seat in the Assembly occupied by the Hon. James Frazee, of the first Assembly district of the county of Onondaga, makes the following report:

That at the last general election, held in and for the first Assembly district of the county of Onondaga, the said James Frazee and the said Sidney H. Cook were opposing candidates for the office of Assemblyman in said district. That the petitioner claims that the inspectors of election in the first election district of the town of Spafford, and in the second election district of the town of Camillus, also in the first election district of the town of Camillus, committed errors and irregularities in the canvass of the Assembly votes in each of these districts.

The proofs submitted to the committee on behalf of the claimant consists of evidence taken before the county judge of the county of Onondaga, in pursuance of the provisions of the statute in such case provided, and a certificate of the clerk of the county of Onondaga, showing that the whole number of votes given in the first Assembly district were three thousand eight hundred and fifty-seven; of which James Frazee received one thousand nine hundred and twenty, Sidney H. Cook one thousand nine hundred and nineteen, Sam fourteen, Blank one, and Mr. Eastman three. Also, certificate of town clerk of the town of Camillus, showing that the whole number of votes given for Assembly in the first election district were two hundred and sixty-eight, of which Mr. Cook received one hundred and seventy and Mr. Frazee ninety-eight. Also showing that the whole number of votes given in the second election district of said town

were two hundred and thirty-one, of which Mr. Cook received one hundred and thirty-three, Mr. Frazee ninety-seven, and Blank one.

The evidence on the part of Mr. Frazee consists of testimony of Mr. John J. Rhoades, C. B. Wheeler, James Monroe, David Allen Munroe, Isaac Harris, and Samuel H. Stanton, taken before your committee; also, certificate of the clerk of the county of Onondaga, showing that he is entitled to the seat occupied by him as member of Assembly for said district.

The testimony in relation to the proceedings of the board of inspectors in the first election district of the town of Spafford, consists of the affidavits of two of the inspectors, one of the clerks, and a bystander, and the evidence of two of the inspectors taken before your committee. No question is raised as to the proceedings in the canvass of the votes until the count for member of Assembly. The Assembly box was emptied upon the table, and the votes counted unopened. Upon the first count the number of votes did not agree with the poll list. The votes were then counted unopened a second and third time, and each time were found to agree with the poll list. On counting the second time, Harris found two votes which he counted as one the first time. The three inspectors and two clerks then proceeded to open the votes and place the tickets for each candidate in a pile by itself.

They then counted and declared off the number of votes thus opened and placed in the separate piles, and it was found that the aggregate number of votes when opened exceeded the number on the poll list by two votes. When it was found out that there was an excess, Mr. Harris, one of the inspectors, after he had opened the ballots and placed them in the pile, and declared them off, called the attention of the inspectors to the fact that he had opened a ballot which he thought had the appearance of being folded together. The other inspectors did not see the ballot which Harris stated he thought had the appearance of being folded.

The inspectors then examined the law, and found that when there was an excess of votes after they had been opened, they must be put

back into the box, and shaken up, and the excess drawn out. The votes were placed in the box by Mr. Mason, one of the inspectors; and Mr. Stanton, who was also an inspector, drew out two votes, which were destroyed. The votes thus drawn out were for Mr. Cook. The evidence of Mr. Harris, and Mr. Wallace, who was a bystander, shows that the supposed folded votes were for Mr. Frazee.

The other inspectors had no knowledge upon the subject, for the reason that their attention was not called to the subject until after the said supposed folded vote had been opened and placed in the pile and counted. The evidence of Mr. Harris, taken before your committee, shows that the votes which he supposed were double, had only slipped together; that they were not folded. And the evidence of Mr. Stanton shows that he found two or three votes thus slipped together, and that it is a common occurrence. The evidence also shows that the ballots overrun the poll list in two other boxes. These are all the facts in relation to this canvass. Your committee are of the opinion that the canvass was properly and fairly conducted, and that the board performed their duty with honesty and integrity. If there was any fault, it lay with the individual inspector in not announcing the presence of a double ballot at once, upon the detection of such ballot; but the action of the board was in accordance with the strict letter of law. It would be a dangerous and unauthorized precedent to overhaul the count after the votes had been opened and counted, upon the suggestion of *one* of the inspectors that he had neglected his duty in omitting to exhibit a double ballot to the board. The law requires an *inspection by the board* of the ballot which is brought in question. The board cannot act upon the statement of one of the inspectors after the ballots have been open and counted, nor will the Legislature in such a case. Such practice would enable one of the inspectors to defraud the others, and give to *one* the privilege and right of deciding a question which the law has wisely committed to the whole board of inspectors.

For these reasons your committee are of the opinion that no

error was committed in the canvass of the votes in the said election district.

The next error alleged to have been committed is in the canvass of the votes in the second election district in the town of Camillus.

The evidence taken by the claimant consists of the testimony of two inspectors and one of the clerks of the poll. From this evidence it appears that upon counting the ballots in the Assembly box, unopened, they were found to agree with the poll list. The inspectors then commenced opening the ballots. In opening the ballots, William Ecker, one of the inspectors, announced to the board that he had found what appeared to be a double ballot, and the board, after inspecting the ballot and reading the law, decided, by a unanimous vote, that it was a double ballot, and rejected it. The double ballot was for Cook. There was one blank ballot found in the Assembly box with the name of candidate erased. The poll list had two hundred and thirty-three names upon it. By counting the folded ballot as two votes and the blank ballot, there was an excess of one vote.

In canvassing one of the other boxes, a vote for Assembly was found, but the same was not counted, for the reason that the list for Assembly was full without counting it. The board did not finally destroy the double ballot until they had counted the votes over two or three times, and ascertained, if it was counted as two votes, there would be an excess of one vote. Instead of throwing away the identical ballot, two equivalent ballots for Mr. Cook were thrown away. This was, at least, a mere matter of ceremony, as by the rejection of the votes by the unanimous decision of the board, the same result had already been produced.

In the opinion of your committee the folded ballots were properly and legally rejected. After the announcement no further business was done until the decision of the board to reject the double ballot. The subsequent counting was a matter of prudence and caution, carefully exercised to ascertain if, by accident, the two ballots might not have slipped together. The stray vote for Assembly, found in another box, could not have been counted with-

out creating an excess of votes in the Assembly box. There was no error committed by the board of inspectors; on the contrary, the provisions of the statute were strictly complied with, and the double ballot could not have been counted for Mr. Cook without a direct, open and palpable violation of the election laws by the inspectors.

The last error, of which the complainant complains, consists in an alleged irregularity in the first election district of the town of Camillus.

The board of inspectors in this district, upon canvassing the judiciary box, found two Assembly ballots, which were said to be for Mr. Cook. The two votes were placed under a lamp, with the understanding that they were to be counted for Mr. Cook. The Assembly box was then opened, and the votes counted unopened, and agreed with the poll list. The evidence of two of the inspectors and clerks do not show whether the two votes under the lamp were counted, in order to make the unopened ballots agree with the poll list. Mr. Nott, one of the inspectors, swears he cannot say whether they were or were not counted for Mr. Cook.

Mr. Tinkham, also an inspector, swears he cannot positively say whether they were counted with the unopened Assembly votes. Mr. Freeman, one of the clerks, has no recollection of the two votes being counted. Mr. Darling did not know whether they were counted or not. The evidence of Mr. Rhoades, one of the inspectors, is, that he is *sure one* of the votes under the lamp *was counted*, and *thinks* the other was. The evidence of James Monroe is *positive*, that he saw Mr. Wheeler *take* the two votes from under the lamp and put them in the pile of unopened ballots, and *that they were counted with the unopened ballots*, making in all two hundred and seventy ballots. Mr. David A. Munroe swears positively that one of the votes under the lamp was counted, and that there were no votes under the lamp when the Assembly votes were counted. The two votes in question were only placed partly under the lamp, in plain view of the board, while they remained there. Upon opening the ballots in the Assembly box two votes for judi-

ciary were found, and placed under the lamp, and afterwards counted. The inspectors returned two hundred and sixty-eight votes for Assembly. The only question which arises, is, were the two votes for Assembly, which were for Mr. Cook, counted? and upon the evidence your committee do not see any room for doubt. While the evidence on the part of the claimant is uncertain and doubtful, the evidence on the other side is clear, explicit and positive. There is no room for doubt; the positive evidence of a witness of high character, holding the office of sheriff of the county, cannot be overcome by the negative testimony of several members of the board, who *do not pretend* to have any recollection or knowledge as to whether the votes were or were not counted.

In the judgment of your committee there is no evidence showing the two votes were not counted; and it is impossible to resist the *positive evidence* which must, and should control, the decision of the committee.

But even should there be a doubt, the fact that the three inspectors and the clerks, with one exception, were attached to the same political organization with the claimant, and that the returns were all made out and signed, and returned, and declared by Mr. Wheeler, who had the principal charge of the figuring and final drawing of the returns, to be right, and who does not pretend to have any recollection as to whether the two votes were or were not counted, is most convincing evidence that the result given by the inspectors was not erroneous. Your committee have thus reviewed the testimony bearing upon the canvass in the third election district, in which the claimant alleges error, and they submit their report with entire confidence that the facts do not warrant a report for the claimant.

Under the Constitution the House is the judge of the elections, returns, and qualifications of its own members; but the judgment of the House should be that calm and deliberate judgment which only disfranchises the sitting member when there is a clear and palpable error which cannot be overlooked. We submit our report

to the judgment of the House, with entire confidence that justice will prevail.

ROBT. F. AUSTIN.
JOHN MATHER.

Assembly Documents, 1858, No. 70.

Case of Wm. J. C. Kenny and Lewis Hopps.

FOURTH DISTRICT, NEW YORK CITY — PETITION PRESENTED.

ASSEMBLY CHAMBER, *January 1, 1861.*

Mr. Benedict presented the memorial of Mr. Lewis Hopps, claiming to have been elected as a member of Assembly from the fourth Assembly district of the county of New York, instead of Mr. Kenny, which was laid on the table.

Assembly Journal, 1861, page 5.

PETITION REFERRED TO COMMITTEE.

ASSEMBLY CHAMBER, *January 8, 1861.*

On motion of Mr. Benedict,

Resolved, That the protest of Lewis Hopps in relation to his claim to the seat on this floor now occupied by the Hon. Wm. J. C. Kenny, of New York, be taken from the table and referred to the committee on privileges and elections.

Assembly Journal, 1861, page 57.

COMMITTEE EMPOWERED TO SEND FOR PERSONS AND PAPERS.

ASSEMBLY CHAMBER, *January 16, 1861.*

On motion of Mr. Finch,

Resolved, That the committee on privileges and elections, have power to examine witnesses and to send for persons and papers in the matter of the contest for the seat of Hon. Wm. J. C. Kenny by Lewis Hopps.

Assembly Journal, 1861, page 107.

REPORT OF MAJORITY OF COMMITTEE.

ASSEMBLY CHAMBER, *February* 20, 1861.

Mr. Fisher from a majority of the committee on privileges and elections, to which was referred the petition of Lewis Hopps, claiming the seat now occupied by Wm. J. C. Kenny, reported adversely thereto, which report was laid on the table and ordered printed, and is as follows, to wit:

IN ASSEMBLY, *February* 20, 1861.REPORT OF THE MAJORITY OF THE COMMITTEE ON PRIVILEGES
AND ELECTIONS, ON THE PETITION OF LEWIS HOPPS, CLAIMING
THE SEAT NOW OCCUPIED BY WILLIAM J. C. KENNY.

The committee on privileges and elections, to which was referred the petition of Lewis Hopps, claiming the seat occupied by W. J. C. Kenny, as member of the fourth Assembly district of the city and county of New York, report:

That they have heard the evidence adduced by the petitioner in support of his petition, and that offered by the sitting member in opposition thereto, together with the allegations and arguments of the parties thereon, and have come to the following conclusions thereon:

This contest arises from a doubt as to the exact vote polled for Mr. Kenny, at the sixth election district of the seventh ward of the city and county of New York. It is claimed by the petitioner, Lewis Hopps, that the vote for Mr. Kenny was two hundred and one; it is admitted on all hands that this vote would defeat Mr. Kenny. The official return gave Mr. Kenny two hundred and ten; it is admitted that this vote, if correct, elects him.

The petitioner attempts to sustain his allegation, that the vote for Mr. Kenny, at the election district in question, was two hundred and one, and not two hundred and ten, on the alleged fact that the chairman of the board of canvassers made public oral proclamation at the closing of the canvass, that the vote was two hundred and one. This he attempts to show by the evidence of policemen

and other bystanders, who so understood the announcement, and made memoranda of the same at the time on slips of paper.

The following is, in substance, the evidence relied on to support the petition, and also that offered in opposition thereto. The material facts on both sides are given:

Theron R. Bennett, police captain, identifies a slip of paper as the one brought to the station-house, containing a memorandum of the vote for Kenny as two hundred and one. He also testifies to a custom of the police department to detail men at each election district, with printed blanks, whose duty it is to fill them out as the votes for the respective candidates are announced, and return them immediately to the station-house. Mr. Bennett was not at the polls, and knows nothing personally of what occurred there.

Thomas W. Thorne, sergeant of police, also identifies the same slip of paper as the one brought to the station-house. He was not at the polls, and knows nothing personally of what occurred there.

Henry Moran, policeman, was one of the officers detailed at the polls in question, and was present at the canvassing of the votes. He says: "I heard the chairman declare the result; as far as I can recollect, he declared for Hr. Hopps two hundred and seventy-three, and for Mr. Kenny two hundred and one, I think, to the best of my knowledge." On his cross-examination, he testifies that the vote, as declared, was two hundred and one. He says: "I put the figures down in my pocket-book; it is in my house; I looked at it last night; I put it down a month ago" (which would be nearly three months after the election). This witness was the man who took the slip containing the Assembly vote to the station-house. He says it was handed to him by Policeman Jubo. (There was evidence to show that this officer had been on duty the whole of the preceding day and night, and was up all of the night of election day, and was, in consequence, somewhat drowsy, and slept during a part, at least, of the canvass. But no blame was imputed to the officer.)

Joseph Jubo was another policeman detailed at the polls, and

was present at the canvassing of the votes. He says: "I heard the announcement made by the chairman of the board; it was two hundred and seventy-three for Hopps, and two hundred and one for Kenny; I made out the slip; I was sitting behind the chairman of the canvassers; I gave it to Moran, and told him to take it to the station-house; the figures on it are made by me; they counted the vote for Assembly over three times."

On his cross-examination he says: "The first announcement made was the same as shown on the slip of paper made by me. The second announcement was the same. The third, I believe, was a little different. I don't recollect as to what figures the difference was on the third announcement." (It is observable that this evidence, so far as it goes, goes to show that there were several announcements of the vote; that the figures put down by him on his slip of paper, were those *first* announced, and that the last announcement was different in some respects, but how, the witness cannot state.)

The slip of paper, which was produced, shows that the figures opposite Kinney's name have been scratched out, and other figures, two hundred and one, written by the side of the first figures. This witness Jubo (who, it will be remembered, himself filled out the blank slip), thus testifies in respect to that alteration:

"I can't say what the figures written in front of Kenny's name, were at first. At first it looks like two hundred and ten scratched out. I scratched out the figures, because they thought there was a mistake. I don't swear that the figures scratched out are two hundred and one. I would not swear they are not two hundred and ten; can't say that one of the announcements was two hundred and eleven. Don't recollect telling anybody that it was so; nor two hundred and thirteen, nor two hundred and fifteen, nor two hundred and ten. All I know about it is, what there is on that paper."

Thus it appears quite possible that this witness, who is a principal witness for the petitioner, had the figures written on his slip

at first two hundred and ten, and that there was considerable difficulty and doubt, and several announcements, naturally leading to confusion.

John Hennesey, another policeman, testified that he was present at the canvass; that he arrived there just after they began to canvass the Assembly vote; that they had counted the Assembly vote once before he got there; that there had been a disagreement on the first vote; that they took the boxes and turned the ballots on the table; that they counted them again, twisted up in bunches of tens, and then opened the bunches and counted them again by single ballot; after which, Mr. Petty, the chairman, stood up and announced the vote as two hundred and one for Kenny; thereupon the ballots were destroyed. He further says, on his cross-examination, that he took note of the Assembly vote, because it was a "tight run," but that he neither took nor kept any memorandum of the vote.

Alexander F. Roberts testified that he was clerk of the election and clerk of the board of canvassers.

(It is proper in this connection, to mention that under the registry law, in New York city, the *canvassing* of the votes is not done by the inspectors. The inspectors, on closing the polls, deliver the ballot-boxes to the three canvassers, who organize on the spot, and proceed to canvass the votes and make the returns, as is done in other counties by the board of inspectors. The clerks of the inspectors usually continue to act as clerks to the canvassers.)

Roberts, clerk of the canvassers, further testifies that he did not keep tally of the Assembly vote, but that he heard the chairman, Petty, announce the vote as two hundred and one for Kenny.

On cross-examination, he says: "Fordham, the other clerk, kept the tally on Assembly vote. I did not make any memorandum, but was writing out the presidential returns at that time. It was part of my duty to make the return to the canvassers. I made the returns for Assembly. That appears two hundred and ten for Kenny, as I made it. I could not tell a month after the election

what the number of votes was for any other candidate, from my memory. I happened to recollect this, because I went to the board of supervisors while they were counting the returns. Hopps came to me, and asked me if I recollected the vote. It was the week following the election. I tried to recollect, and told him I could not then tell. He asked me if the figures were not two hundred and one, and when he said that, it came to my mind that that was the vote. I don't think I would have recollected independent of that."

Here the counsel for Mr. Hopps rested his case, and on behalf of Mr. Kenny —

Daniel L. Petty, chairman of the board of canvassers, and who canvassed the vote at the polls, was examined. He testifies:

"Our first canvass of the vote for Assembly, was between two and four o'clock in the morning. Mr. Murphy (on the first count) differed ten votes from Fordham, the clerk. Meanwhile some one in the room remarked that the vote was very close. I insisted the vote should be opened and recanvassed, as the difference of ten might decide the vote. In recanvassing, we were very particular; one man would open the ballots and recount them, and hand them to another, and he would do the same, and the third man the same. In the recanvass (the second time), we found four (4) McCauley votes among Kenny's, very much resembling the Kenny votes (McCauley was a third candidate). Then, in some other boxes, we had found two (2) tickets for Assembly. These two we had put aside. We first found two hundred and fifteen for Kenny; we deducted the four (4) McCauley votes. Then we put in the two we found in the other boxes and mixed them up with the others, and drew two out. This we did after the second canvass. We drew out one Kenny and one McCauley vote. That brought Kenny's vote to two hundred and ten. On the last canvass, all three (canvassers) kept a tally.

"I did not announce the vote as two hundred and one. I announced it as it was officially returned. That was two hundred and ten. I was chairman of the board of canvassers. Thomas

Murphy and Mr. Marriner were the others. Murphy and I were republicans and Marriner was a democrat. I saw the returns made out, and that they were made out correctly. I watched particularly the Assembly returns, because I knew there was a feeling between Hopps and one of the clerks, and I was determined the thing should be straight. One of the policemen was fast asleep and snored aloud, and I called attention to it.

"I watched Fordham (the democratic clerk) very closely.

"At the close of the first canvass, Mr. Murphy made two hundred and five for Kenny; Fordham made it two hundred and fifteen, and said he knew it was correct. I insisted on a recanvass."

On cross-examination, this witness states that he had no acquaintance with Kenny, and never met him till the day before he testified. He further testifies that his recollection was based on the returns, and on the other circumstances that were detailed; that, independent of those, he could not recollect, and that his memory was bad on figures. He voted for Mr. Hopps and watched the clerks very sharply, and was satisfied they were correct.

Thomas Murphy testified: I was one of the canvassers. There were four or five candidates. The declared vote on Assembly was two hundred and seventy-three for Hopps and two hundred and ten for Kenny. We counted the ballots twice. I found two hundred and five for Kenny at first. One of the clerks (Fordham), who was opposed to our candidate, Mr. Hopps, kept the tally. Being a little afraid to trust to him, I kept the tally myself. He made it two hundred and fifteen. We agreed to count them over, and counted them over. We found two hundred and fifteen correct. I discovered (4) four McCauley tickets, counted in for Kenny, and handed them back to Petty, chairman of the board. They were deducted from Kenny and added to McCauley. The number of votes overrun the poll list two votes. We put the ballots in and drew out two by chance. We drew out a Kenny and a McCauley ticket; that made Kenny's vote two hundred and ten. There were some informal announcements. The last formal announcement was two hundred and ten for Kenny,

and two hundred and seventy-three for Hopps. I saw the return before I signed it. It was written two hundred and ten and two hundred and seventy-three. That was correct. I watched Fordham, the clerk, very carefully, and am a republican."

On his cross-examination, he says: "I always knew the votes, and have always since remembered them distinctly. We all agreed on the vote, and I directed Mr. Petty to get up and announce it. I remember it distinctly. It was two hundred and seventy-three and two hundred and ten. Each canvasser counted all the votes. If I had not seen the returns at all for a year, I should have remembered the announcement and the vote."

It will be noticed that he swears very positively and clearly, and professes to have an excellent memory.

George H. Fordham testifies: "I was one of the clerks of the election. I kept the tally on account of the Assembly votes on the first count. I found two hundred and fifteen votes for Kenny, and two hundred and seventy-three for Hopps. Murphy found two hundred and five for Kenny, and same as I for Hopps. We counted the ballots the second time. We found Hopps' vote correct, and Kenny's correct, except as to four (4) votes counted for Kenny, which belonged to McCauley, which we deducted from Kenny and gave to McCauley, making Kenny's vote two hundred and eleven. Then there were two ballots more in the box than the poll-list called for. One of the canvassers, Marriner, drew out two ballots from the box. We destroyed the two ballots. One was for Kenny and one for McCauley. I kept as careful an account as I could. Two hundred and ten were finally allowed to Kenny. The canvassers all agreed to that. Don't remember hearing any vote announced. I think I did not make out the returns. I think Roberts did. I saw the returns when they were made. I believe they were correct, to the best of my knowledge. I don't think there was any mistake as to filling up the returns. Can't say the policemen were asleep. I heard one of them snore. We clerks watched each other pretty sharp. They were interested on one side, and I on the other. I was a democrat and they were republicans."

Cross-examination.—Question: “Did you say at the polls that day, to Mr. Petty or any one else, that you meant to defeat Mr. Hopps if you could?”

Answer: “I think very likely I did; but I did not say that I meant to do it by any dishonorable means. I may have asked Roberts to let me fill out the returns. We first counted the votes and found two more than the poll list.” He again testifies that there was a discrepancy on the first vote; that they again counted the votes in bundles of ten, as they had been twisted; that they then untwisted the bundles and counted them again, and discovered the four McCauley votes.

John Glass, a bystander, who was present at the canvass of the vote testifies that he kept a tally. “When they got through I set it down. I heard the clerks that kept the tally announce the vote. The announcement by one of the clerks was two hundred and fifteen; the other, two hundred and five for Kenny. On account of the disagreement, there could be no announcement. Mr. Petty proposed to count them over. He counted two hundred and fifteen. He said that was correct. Then I took the figures down with pencil and paper. I did not stay to see them counted again. I made the memorandum at the time.”

Memorandum produced, and marked B, Jan. 30, 1861. This memorandum shows the figures:

Hopps	273
Kenny	215
McCauley	41
O'Shea	1

James M. Bailey testified: “I was present during a portion of the canvass. There was a dispute between one of the clerks and one of the canvassers. One of the canvassers had two hundred and five, and the clerk had two hundred and fifteen for Kenny. There was no dispute about Hopps' vote, two hundred and seventy-three. They

took them out of the cigar box, and counted them again; did not open the ballots. After they got through, they all agreed upon two hundred and fifteen. Petty said, 'that is right, Glass, put it down on a piece of paper.' "

Patrick H. Keenan testified: "I was present while part of the vote was canvassed, but left before they got through. Hopps' vote was counted first, two hundred and seventy-three; when they counted the vote for Kenny, there was a difference, one had two hundred and fifteen, the other, who sat at the left of Fordham, had two hundred and five. Petty said they would count again. They took the vote out of the cigar box and counted again, and made it two hundred and fifteen."

Here counsel for Kenny rests and on the part of Mr. Hopps,

George A. Rutzer testified: "I attended at the poll; I did not see them canvass; got in there just before they got through the canvass of Assembly votes; Petty made the announcement, Hopps two hundred and seventy-three, Kenny two hundred and one; I took it down on paper at the time; I put it down, and went directly to Hopps' house." (The paper put in evidence, and marked C, Jan. 30, 1861. It shows, indistinctly written, Hopps two hundred and seventy-three, Kenny two hundred and one.) "I heard the announcement distinctly; heard no other announcement; Mr. Petty got up and announced the vote."

On cross-examination, he says: "I was not close enough to see what they were doing. I am unable to say how they counted them; I got in there just in time to hear the announcement; I don't know whether I should have remembered, independent of that memorandum; I have used that paper every day since; my customers' names are on it."

Allen S. Haynes testified: "Went to the polls about three o'clock in the morning, and asked the board of canvassers for the vote on Assembly; Mr. Petty called it off, two hundred and seventy-three for Lewis Hopps, and two hundred and one for Kenny; I set it down in a memorandum book, and left the place." (The

book was produced, and the leaf containing the memorandum torn out and put in evidence, and marked D, Jan. 31, 1861. It shows the figures, Hopps two hundred and seventy-three, Kenny two hundred and one.)

On cross-examination, he testified: "I asked somebody, and he told me the vote had been counted; I did not know what it was; I have spoken about this case with Hopps and his counsel, and a good many; I have been a member of a fire company; I have been intimate with Hopps, and was anxious he should be elected."

Here counsel for Hopps rests, and on behalf of Mr. Kenny,

James O. Keefe testified: "Went to the polls for the returns on the night of election; I asked Fordham for the vote; Petty got up and asked Fordham what he made it, he replied, two hundred and seventy-three for Hopps, and two hundred and fifteen for Kenny; Petty took the votes out of a cigar box and said: 'To be sure, we will count them over again.' He counted the tickets into the box and said, 'that is right; that is what I make it.' I make a memorandum there; the paper produced is that memorandum." (Paper put in evidence, and marked E, Jan. 31, 1861. This paper shows a column of figures footed up, the last number, except the footing, being two hundred and fifteen, as follows:

62
141
133
—
336
171
—
507
142
—
649
215
—
864)

"I took down Kenny's vote only. The last on the paper is the vote for Kenny."

On cross-examination, he says: "I never spoke to Kenny till last night about this memorandum; never told anybody about this memorandum till I was coming up in the cars on Tuesday."

John Marriner, the third canvasser, testified: "I was one of the canvassers. We commenced canvassing Assembly vote, and counted them out in piles of ten each. We put them into a cigar box, and then footed up the tally, and the result was that Mr. Kenny had two hundred and fifteen votes; Mr. Hopps, I think, had two hundred and seventy-three. There was some difference of opinion between Fordham and Petty, and Mr. Murphy also said they did not tally. Mr. Petty said we had better go over it again, as it was getting to be pretty close. Some outsiders were dissatisfied also. We then opened the bundles, and unfolded the tickets, and then counted them over carefully, and found two or three tickets that belonged to McCauley; Kenny's name had been scratched out with a pencil and McCauley's name inserted. Those tickets were deducted from Kenny's vote, making his vote two hundred and thirteen or two hundred and twelve. There were then two ballots more than the poll-list. We put them all in the box and shook them up, and I drew out two; one was a Kenny and one was a McCauley vote. That is all I know. We all agreed that Kenny had two hundred and ten. I saw the returns that evening after they were made out and signed; they were correct, to the best of my knowledge. I heard an announcement made of the result by Mr. Petty, chairman of the board, and only once, to the best of my knowledge. It was two hundred and ten for Kenny. I heard no announcement of two hundred and one by any of the canvassers. I did not hear any one outside say two hundred and one. There was an outsider said it did not tally. I saw one of the policemen asleep and woke him up myself. He was a stout man. It was after twelve o'clock at midnight. I awoke him to take the tickets and burn them up. It was while the can-

vass was going on that he was asleep. I woke him up to burn up the tickets. They were pretty well fagged out, all of them. They had been up all day and all night."

On examination, he says: "I was a canvasser and inspector in thirteenth ward, New York, for four or five years, and two years in the seventh ward. I kept no memorandum only at the time of counting. I know I could have told a week after election what the returns for Assembly were. I have heard Fordham (the clerk) say he would do all he could to defeat Mr. Hopps. We found one or two Assembly tickets in the other boxes. There was a difference between Fordham's and Petty's count. Fordham had it two hundred and fifteen; Petty had it one or two different. I am not positive as to the difference. I have talked with Fordham about it several times. The two we drew out was one for Kenny and the other for McCauley. We counted up and found two hundred and ten. I have no positive recollection about the tickets in the other boxes. I know the officer was asleep; I woke him up myself."

Here the testimony was closed.

The only question is one of fact. Was the vote for Mr. Kenny two hundred and one or two hundred and ten at the district in question?

To determine this question, two other questions arise.

First. Was there an announcement of two hundred and one made by the chairman of the board? and,

Second. If there was such an announcement, is that fact proof conclusive as against the returns fortified by the evidence in the case, that such was the vote?

First. Was there an announcement of two hundred and one made by the chairman of the board?

Let us judge by the evidence above detailed, the substantial parts of which on both sides are above given. The first two witnesses for the petitioner (Bennett and Thorne) were not at the polls at all. They only identify the slip filled out by Jubo as the one brought to the police station.

Moran, policeman, testifies, "as far as he can recollect," and "to the best of his knowledge, that the announcement was two hundred and one." He made a memorandum of it about three months after election in his pocket-book. He was quite drowsy and asleep during part of the canvass.

Jubo, policeman, made out the slip, and sent it to the police station by Moran. His evidence is that the figures put down by him (two hundred and one) were those first announced, which is contradicted by the great weight of evidence, which tends to show that the first count was two hundred and fifteen. Moreover, the figures first made by him are scratched out, and he is altogether uncertain what those figures were; and he says there were several announcements.

John Hennesey, policeman, testifies that the announcement was two hundred and one, but that he kept no memorandum.

Alex. F. Roberts, clerk of the canvassers, testifies to the announcement of two hundred and one, but frankly admits, on his cross-examination, that he would not have recollected it, but for having been reminded of it a week after election by Mr. Hopps. Moreover, it was his duty to make out the returns. He says he did make them out, and made them out two hundred and ten. Why did he do this if the announcement was two hundred and one?

George A. Rutzer came in just before the close of the canvass, and says he heard an announcement by the chairman of two hundred and one, and made his memorandum of it which he produces. He says that he was not near by; not close enough to see what they were doing; but got in just in time to hear the announcement.

Allen S. Haynes, an intimate friend of Mr. Hopps, came in about three o'clock in the morning, after the close of the canvass, and inquired as to the vote, and he says on his direct examination that Mr. Petty called it off two hundred and one. He made a memorandum which he produced. In his cross-examination, he says he "asked *somebody*, and he told me the vote had been counted." It is not pretended that this was a public announcement, but information *somebody*, *perhaps* Chairman Petty, gave him.

Here are then six witnesses who understood the vote to be two hundred and one. Jubo, Rutzer and Haynes made memoranda of the vote. Jubo is the only one of the three who witnessed the canvass. Rutzer and Haynes came in at, or after the close of the canvass. Moran and Hennesey were very much fatigued by the sleeplessness and labor of two nights and a day, and their faculties may reasonably be supposed to have been somewhat dulled by exhaustion, and Roberts the clerk, frankly admits that his recollection is based on Mr. Hopps reminding him, without which he could not have recollected and that he made the returns all contrary to what he now declares the announcement to have been. This is the whole case for the petitioner, and on that he relies to establish his claim, that the vote was two hundred and one, not two hundred and ten.

It is not necessary to suppose that any of these witnesses have been guilty of bad faith or improper motives in their evidence, even if we differ from the conclusion sought to be drawn. The principal witness is Jubo, who testifies that he sat behind the chairman of the canvassers and witnessed the canvass. It will be remembered that he says his memorandum was made from the *first* count, when the evidence is clear that the first count showed two hundred and five and two hundred and fifteen, and not two hundred and one, and moreover, that the figures on his slip have been altered. It is quite possible that he honestly made a mistake. We all know the liability of mere bystanders, who do not take an official part in the canvass, to indulge in conversation, or other incidental occupation. A mere bystander, even if it be his business to collect returns, is not likely to have his attention constantly called to the whole canvass during its entire progress. It is pretty clear that there *was* some idea among outsiders that the vote was two hundred and one. It is possible that Petty may so have announced it. A man might easily read two hundred and ten, two hundred and one by mistake, and *vice versa*. But when we consider the evidence to the contrary, even this will appear impossible.

Daniel L. Petty, chairman of the board, testifies fully, positively

and clearly, that the vote was two hundred and ten, and the announcement also. He explains fully how the vote was first counted, and showed a discrepancy; the clerk, Fordham, having it two hundred and fifteen and one of the canvassers two hundred and five. He insisted on a re-canvass, when the figures two hundred and fifteen proved to be correct. He explains how this two hundred and fifteen was reduced to two hundred and ten. No better evidence can be given, it would seem, than this. He was chairman of the board. His mind was constantly intent on the business. It was his duty. He had come fresh to his duty as canvasser on the close of the polls. He knew that the vote was close, and that there was a jealousy between Fordham (the clerk), and Hopps (the candidate), He says that on these accounts he took special care, and is satisfied the returns are correct. His evidence is its own best commentary, and reference is made to it. He has no acquaintance with Kenny whatever; never saw him till the day before he testified, and was a political friend of Hopps. He says he watched the clerk very sharply.

Thomas Murphy testifies to the same general effect. He corroborates Mr. Petty the chairman, in every important particular. He found two hundred and five for Kenny on the first count and Fordham, the clerk, two hundred and fifteen. In a re-canvass, Fordham's count was found to be correct. He then explains how it was reduced to two hundred and ten. He kept tally himself, and took special pains. He says his memory is excellent, and that he could remember that vote a year without any refreshing of his memory, and that he *cannot be mistaken*. He spoke with great confidence, and his manner and appearance bore out his statement. He also was a republican, and a friend of Mr. Hopps.

John Marriner, the third canvasser, testifies to the same general effect as the other two canvassers. He details the same circumstances; that the vote was at first two hundred and fifteen; the manner in which it was reduced, and that the vote and the announcement were two hundred and ten. He differs a little as to the num-

ber of McCauley's votes found among Kenny's votes, saying it was two or three, while the other witnesses say it was *four*. This circumstance does not shake his general evidence, but ought to confirm it, as it shows that there was no collusion among the witnesses to tell a manufactured story. He was a democratic canvasser.

It will be seen that the three canvassers all agree in a consistent, detailed, careful account of the whole matter. It seems almost impossible that they can have testified honestly, unless their testimony be a true reflection of the facts. In so far as their prejudices were concerned, two were republicans and one a democrat. It is not to be presumed that this circumstance would have influenced their official course; but it shows at least that no indirect influence of that kind could have operated in favor of Mr. Kenny. They were all intelligent men, and had had experience as inspectors and canvassers.

George H. Fordham, the clerk, sustains them throughout. He kept tally. His evidence is very clear, and consistent with that of the canvassers and with itself. There seems no reasonable theory upon which his evidence can be reconciled with good faith, except the theory that he has testified correctly. He could not testify so minutely and in such detail about what he did himself and must have done consciously, unless he either remembered it or was testifying to what he knew to be untrue. And it will be remembered that the canvassers all confirm his statement, and consequently, if he testified untruly, they must all have conspired with him to commit a fraud. This is incredible. There is no evidence to warrant it, except the statements of Petty and Murphy, that they watched Fordham closely, because they knew the unfriendly feeling existing between him and Hopps, and his expressed intention to defeat him (Hopps). There is evidence to justify any suspicion of his honesty. It is true that he did express an intention to defeat Hopps, if possible. But his own explanation goes to show that he made this remark as a partisan, and that he did *not* say that he intended to resort to any dishonorable means in order to defeat Mr. Hopps.

John Glass, a bystander, heard the announcement of the vote, two hundred and fifteen and two hundred and five. He was present until the vote was recanvassed, and the vote appeared to be two hundred and fifteen. He made a memorandum thereupon of the votes, showing Kenny's vote two hundred and fifteen. This confirms the statements of the canvassers, and of Fordham, the clerk, as to the first results of the canvass.

James M. Bailey was in Glass's company, and confirms his statement.

Patrick Keenan confirms the statement of Glass, Bailey, the three canvassers, and the clerk Fordham, as to the first results of the canvass, being two hundred and fifteen for Kenny, which was reduced to two hundred and ten, as testified by the canvassers.

Here there are *seven* witnesses who agree in sustaining the account given by the canvassers. Four of them (and those the only men, except the other clerk, who had the official handling and counting of the votes) deny that either the vote or the announcement was two hundred and one. They state that it was at first two hundred and fifteen, and show how it was reduced to two hundred and ten. The other three confirm that part of the account which makes the first results of the canvass two hundred and fifteen, but appear not to have remained present till the final announcement. They *all* contradict the statement of Jubo, the principal witness for the petitioner, who says the first result was two hundred and one, and who is not confirmed in that statement by a single witness.

Here then are *seven* witnesses to *six*, so far as regards the *quantity* of evidence, against the petitioner. But when we consider the nature of the evidence, the respective opportunities of the witnesses for forming a correct judgment as to the vote, their respective liability to error, the evidence seems certainly clear beyond dispute. The conclusion must be that the announcement was as returned by the canvassers, and that some mistake occurred somewhere (where

does not appear) which led to the impression among some bystanders that the vote was announced two hundred and one.

Secondly. The second question proposed to be considered was, whether, if the vote had been announced two hundred and one, that circumstances should overcome the official return, which reads two hundred and ten. Admitting, then, for the sake of the argument, that the vote was announced two hundred and one; suppose a chairman of a board of canvassers makes an incorrect announcement; is it the duty of the canvassers to return the vote as announced, or as it actually was counted? No one will pretend to say it should be returned as announced, under such circumstances. Which, then, is the higher evidence of a correct vote? the official return, certified and sworn to by all the canvassers, confirmed by the recollection of all of them under oath, or the understanding of the bystander that the chairman of the board made an announcement which varies with the official return?

I confess that the mere statement of the proposition seems to me to carry with it, of its own force, the inevitable answer that the official return should prevail. And I should not have spent so much care and time in preparing this report if it did not appear to me that there really was some danger that the action of this House might wrong both the sitting member and itself, through an honest difference of opinion among the members of the committee. The report has been prepared in no spirit of advocacy of either side of the issue, but in the hope to place fairly before the House both sides of the controversy in order to aid it in an intelligent decision.

An official return ought not to be set aside on light grounds. While the Constitution makes this House the exclusive judge of the qualifications of its members, this House should not exercise that right arbitrarily, but is bound by every honest and fair consideration to give a true expression to the wishes of the voters. Certain rules, which have been laid down by the courts to govern cases of this kind, the ordinary laws of evidence and established legal principles, are binding on this Legislature in the examination and

decision of these cases, notwithstanding the constitutional privilege of this House as the exclusive judge of the qualifications of its members. Any other principle would introduce confusion and uncertainty, disfranchise the people, and convert the Legislature from a representative body of the people, into an odious partisan machine.

Your committee have had these considerations in view in making this report.

It is also fair to state that contests of seats should not be unduly encouraged. Of course, any gentleman who is fairly elected should receive his seat. But in cases of great doubt and uncertainty the official return should prevail. These contests are very expensive to the State. This present contest has already cost the State four or five hundred dollars in fees of witnesses alone. A way is provided by statute by which the evidence in these cases may be taken before the county judge, where the contest arises, at the expense of the contestants, and thus the fees of witnesses may be saved to the State and the evidence reported to the Legislature. But this course is seldom resorted to. Contestants prefer to come to the Legislature and have their expense of counsel and witnesses paid by the State. Moreover, a practice appears to have grown up of allowing both the successful and the unsuccessful contestant to receive their *per diem* allowance, as if they had both been duly elected. Without imputing any improper motive to the contestants in the present contest, it is believed that this practice on the part of the Legislature has sometimes encouraged contests on light and trivial pretexts, leading to large expense and to a waste of time and energies of the Legislature. It has not been unusual for contests of this kind to consume the whole or nearly the whole of the legislative session. In the present case the committee believe they have used all the dispatch that was consistent with a fair and impartial examination of the case; some of their number having been engaged on other important committees of this House, and others having been called away from their duties by sickness for much of the session.

These considerations are suggested, not for the purpose of prejudicing the rights or interests of any one interested in the case, but

as reasons why the official returns should not, lightly or without some urgent necessity, be made the subject of a contest; and why the responsibility should be thrown as much as possible on the local boards of county canvassers, who, from their proximity to the places where the disputes arise, and from their direct responsibility to the constituencies whose rights are affected, are quite as likely to form correct judgments as the Legislature.

The adoption of the following resolution is respectfully recommended:

"Resolved, That William J. C. Kenny is entitled to the seat now occupied by him on the floor of this House."

Dated February 19, 1861.

Respectfully submitted.

GEORGE H. FISHER.

I concur in the foregoing report, dated February 19, 1861.

N. HOLMES ODELL.

I concur in the foregoing report, dated February 19, 1861.

CHARLES J. SAXE.

Assembly Documents, 1861, No. 71.

Assembly Journal, 1861, page 361.

REPORT OF MINORITY.

ASSEMBLY CHAMBER, *February 20, 1861.*

Mr. Finch, from a minority of the committee on privileges and elections, to which was referred the petition of Lewis Hopps, claiming the seat now occupied by Wm. J. C. Kenny, reported in writing favorably and by resolution, which report was laid on the table and ordered printed, which was as follows, to wit:

IN ASSEMBLY, *February 20, 1861.*

REPORT OF THE MINORITY OF THE COMMITTEE ON PRIVILEGES AND ELECTIONS, ON THE PETITION OF LEWIS HOPPS, CLAIMING THE SEAT NOW OCCUPIED BY WILLIAM J. C. KENNY.

The undersigned, two of the committee of the Assembly on privileges and elections, to which was referred the petition of Lewis

Hopps, claiming that he is entitled to the seat in this Assembly now occupied by the Hon. W. J. C. Kenny, report: That they have carefully examined the case, have taken the testimony of a large number of witnesses, and find the following facts, to wit:

By the returns from the several election districts, at the county clerk's office, it appears that said Kenny is elected over said Hopps, by a majority of seven votes, Kenny receiving one thousand nine hundred and sixty-nine, and Hopps, one thousand nine hundred and sixty-two; by the same returns, it appears that in the sixth election district of the seventh ward, Kenny receiving two hundred and ten votes, and Hopps receiving two hundred and seventy-three votes. And the undersigned find, that at the close of the canvass, the chairman of the board of canvassers in said sixth district, made public proclamation that said Hopps received two hundred and seventy-three votes, and said Kenny, two hundred and one votes, and that this is the correct number of votes received by said persons respectively. That the returns from all of the other election districts in said Assembly districts are admitted to be correct, and Lewis Hopps is thus elected member of Assembly from the fourth Assembly district of the city of New York, by a majority of two votes over the said W. J. C. Kenny.

As a further fact, conclusive to our minds that Hopps is elected, we find that the whole vote polled in said sixth election district, is five hundred and ninety-one, of which number Hopps received two hundred and seventy-three, Kenny two hundred and one, McCauley forty-seven, O'Shea, twenty-nine, scattering. forty-one; but the official returns in the clerk's office show two hundred and ten votes for Kenny, and only thirty-two scattering.

The undersigned, therefore, recommend to this honorable body the adoption of the following resolution:

Resolved, That Lewis Hopps, of New York, is entitled to the seat in this Assembly now occupied by William J. C. Kenny.

M. FINCH.

C. E. BIRDSALL.

SPECIAL ORDER.

ASSEMBLY CHAMBER, *March 2, 1861.*

Mr. Finch offered for the consideration of the House, a resolution in the words following, to wit:

Resolved, That the contested election case of Lewis Hopps, claiming the seat occupied by Wm. J. C. Kenny, be made a special order for Wednesday next, at 12 o'clock, M.

Mr. Speaker put the question, whether the House would agree to said resolution and it was determined in the affirmative, two-thirds of all the members present voting in favor thereof.

Assembly Journal, 1861, page 458.

REPORTS CONSIDERED.

ASSEMBLY CHAMBER, *March 6, 1861.*

The House then proceeded to the consideration of the special order, being the reports from the majority and the minority of the committee on privileges and elections on the petition of Lewis Hopps, claiming the seat in the Assembly now occupied by W. J. C. Kenny.

Mr. Fish moved that the privileges of the floor be granted to Lewis Hopps, pending the consideration of the special order.

Mr. Speaker put the question whether the House would agree to said motion and it was determined in the affirmative.

SEAT AWARDED TO WM. J. C. KENNY.

The question being upon the adoption of the resolution offered by the majority of the committee in the words following, to wit:

Resolved, That W. J. C. Kenny is entitled to the seat now occupied by him on the floor of this House.

Mr. Speaker then put the question whether the House would agree to said resolution and it was determined in the affirmative.

Ayes, 81. Noes, 5.

Assembly Journal, 1861, page 458.

Case of Henry Arcularius and Dennis McCabe.

SIXTEENTH DISTRICT, COUNTY OF NEW YORK — PETITION
PRESENTED.

ASSEMBLY CHAMBER, *January 1, 1861.*

Mr. Birdsall presented the memorial of Dennis McCabe, claiming to have been elected a member of Assembly for the sixteenth Assembly district of the county of New York, instead of Mr. Arcularius, which was laid on the table.

Assembly Journal, 1861, page 5.

ASSEMBLY CHAMBER, *January 8, 1861.*

On motion of Mr. Birdsall,

Resolved, That the memorial of Dennis McCabe, claiming the seat now held by Mr. Arcularius, be taken from the table, and referred to the committee on privileges and elections.

Assembly Journal, 1861, page 58.

REPORT OF COMMITTEE ADVERSE TO MR. MCCABE.

ASSEMBLY CHAMBER, *February 21, 1861.*

Mr. Finch from the majority of the committee on privileges and elections, to which was referred the petition of Dennis McCabe, for the seat now occupied by Henry Arcularius, reported in writing adversely thereto.

On motion of Mr. Birdsall, the report was laid on the table.

Assembly Journal, 1861, page 373.

REPORT TAKEN FROM THE TABLE — MADE SPECIAL ORDER.

ASSEMBLY CHAMBER, *March 6, 1861.*

Mr. Pierce moved to take from the table the majority report of the committee on privileges and elections, on the petition of Dennis McCabe, claiming the seat occupied by Henry Arcularius.

Mr. Speaker put the question, whether the House would agree to said motion, and it was determined in the affirmative.

Mr. Benedict moved to postpone the further consideration of the question until Friday evening, March 15th, at half past seven o'clock, and that a session of the House be held at that time.

Mr. Speaker put the question, and it was determined in the affirmative.

Assembly Journal, 1861, pages 477, 478.

REPORT ADOPTED — HENRY ARCULARIUS AWARDED SEAT.

ASSEMBLY CHAMBER, *March 15, 1861.*

SPECIAL ORDER — CONSIDERATION OF.

The House then proceeded to the consideration of the special order, being the report of the majority of the committee on privileges and elections, on the petition of Dennis McCabe, for the seat occupied by Henry Arcularius, in the words following:

REPORT OF MAJORITY OF COMMITTEE.

A majority of the committee on privileges and elections, to which was referred the memorial of Dennis McCabe, claiming to be entitled to the seat now occupied in the Assembly by Hon. Henry Arcularius, beg leave respectfully to report:

That the claim of said McCabe to the seat of said Arcularius is founded on the fact alone that the returns from the first election district of the twelfth ward of the city of New York was illegal, and should have been rejected, because *there were only two canvassers* present at the counting of the votes of said district, and the *returns were signed by only two canvassers*, whereas the law requires three canvassers to be present to form a board and to count the votes.

Your committee find that there were three canvassers for said district duly appointed, but that only two of them were present at any time after the closing of the polls and during the canvass of the votes, and that only two canvassers signed the returns from the said election district, and that *the law requires three canvassers* to form a board and to canvass the votes.

It is admitted that the votes of this district, the first election dis-

trict of the twelfth ward, *elect Arcularius*, and, if rejected, McCabe is elected.

Your committee deem it within their province *to go behind all returns*, and ascertain the will of the electors as expressed by the votes cast, overlooking mere informalities and irregularities; and, therefore, in the absence of any fraud in fact, they conclude that they cannot reject the votes given in this election district for the only alleged reason that three canvassers were not present to form a board, nor at any time during the canvass of the votes. We therefore recommend the adoption of the following resolution:

HENRY ARCULARIUS RETAINS HIS SEAT.

Resolved, That Dennis McCabe is not entitled to the seat in this Assembly now occupied by Henry Arcularius.

Pending the question on the adoption of the resolution,

Mr. McDermott moved that Dennis McCabe be admitted to the privileges of the floor during the discussion thereof.

Mr. Speaker put the question whether the House would agree to said motion, and it was determined in the affirmative.

Debate was had thereon, when the Speaker put the question whether the house would agree to said resolution, and it was determined in the affirmative.

Assembly Journal, 1861, pages 577, 578.

Case of Joseph Shook and O. M. Hungerford.

SECOND ASSEMBLY DISTRICT, ALBANY COUNTY — PETITION OF JOSEPH SHOOK PRESENTED.

ASSEMBLY CHAMBER, *January 4, 1865.*

Mr. Stanford presented a petition of Joseph Shook, of Albany county, second Assembly district, contesting seat of O. M. Hungerford, which was referred to committee on privileges and elections.

Assembly Journal, 1865, page 28.

COMMITTEE AUTHORIZED TO SEND FOR PERSONS AND PAPERS.

ASSEMBLY CHAMBER, *January 19, 1865.*

On motion of Mr. Gleason,

Resolved, That the committee on privileges and elections of this House, to which was referred the petition of Joseph Shook, claiming the seat now occupied by O. M. Hungerford, be authorized to send for persons and papers.

Assembly Journal, 1865, page 102.

REPORT OF MAJORITY OF COMMITTEE.

ASSEMBLY CHAMBER, *April 6, 1865.*

Mr. Angel and Mr. Edwards, from the committee on privileges and elections, to which was referred the petition of Joseph Shook, that he may be awarded the seat now occupied by Hon. O. M. Hungerford, reported, in writing.

Mr. Gleason, from the same committee reported, in writing, arriving at the same conclusions.

REPORT OF THE MAJORITY OF THE COMMITTEE ON PRIVILEGES
AND ELECTIONS, ON THE CONTESTED SEAT IN THE SECOND AS-
SEMBLY DISTRICT OF ALBANY COUNTY.

Report of Messrs. Angel and Edwards.

The undersigned members of the committee on privileges and elections, respectfully report:

That we have heard the proofs and allegations of the parties in relation to the contested seat occupied by the Hon. Oliver M. Hungerford, a member of this House, representing the second Assembly district of Albany county, and whose seat is claimed by Joseph Shook, and herewith submit the following facts and conclusions.

By the certificate of the county canvassers, it is shown that Oliver M. Hungerford received two thousand seven hundred and sixty-one votes, and Joseph Shook received two thousand seven

hundred and thirty-two votes, thus electing Mr. Hungerford by twenty-nine votes.

The claim of Mr. Shook to the seat occupied by Mr. Hungerford, is based upon two grounds.

First. Illegal votes that were given for the sitting member; irregularities in the canvass of the votes by which he was deprived of votes that were cast for him, and the rejection of soldiers' ballots that should be counted and allowed in his favor.

Second. That at the poll of the western district of the ninth ward in the city of Albany, the republican, or union electors of the district, were, many of them, prevented from voting by a combination of lawless men, who obstructed the polls, assaulted and beat persons attempting to vote, and drove away from the place of voting, by threats and violence, a number more than sufficient to have changed the result and elected the contestant.

In relation to the first point stated, we find from the evidence the following facts:

By the return of the inspectors of the western district of the ninth ward of the city of Albany, it appears that Mr. Hungerford received in that district four hundred and thirty-five votes, and Mr. Shook received one hundred and forty-nine.

The ballots used by the two opposing parties were printed on paper of different colors, the democratic tickets being printed on yellow paper, and the union tickets on white.

In canvassing the votes the inspectors found over forty tickets of the yellow paper with the names of the union candidates pasted on over the names of the democratic candidates inside the ballot. On two of the Assembly tickets of this kind, the name of Mr. Shook had become loosened after being pasted, but were found inside the ballot when the same was opened. These ballots, evidently intended for Shook, were allowed to and counted for Hungerford, and form a part of his aggregate vote. (See evidence of Stremple, page—.)

These two votes, deducted from Hungerford's aggregate vote, reduce the number to two thousand seven hundred and fifty-nine, and added to Shook's, increase his to two thousand seven hundred and thirty-four.

The vote of Willis Van Wagoner was received at the poll of the eastern district of this ward, and counted for Mr. Hungerford. The evidence shows conclusively that he was not a resident of the district nor of the county, but was then residing in the county of Schoharie. (See printed testimony, pages — and —.) This vote, deducted, leaves the aggregate of Hungerford's vote two thousand seven hundred and fifty-eight.

The vote of John Titus was also given at this poll for Hungerford under similar circumstances, he being at the time a resident of another district. (See testimony, page —.) Deducting this vote leaves the aggregate of Hungerford's vote at two thousand seven hundred and fifty-seven.

The vote of Charles Lewis, a soldier, was cast at the poll of the lower district of the ninth ward by Mayor Perry. This vote is objected to by the contestant on the ground that Lewis was not a resident of the ward when he enlisted. From the evidence of the mayor this fact seems apparent; but as there is no proof of the person for whom he voted, no deduction of the vote can be safely made.

Thomas B. Laraway voted for Mr. Hungerford in the western district of the tenth ward, giving his residence at the alms-house in that district. The clerk of the alms-house, called as a witness, testifies that no such man as Thomas B. Laraway resides at the alms-house, or was ever there as a pauper or otherwise, or is known there. This man was registered as at the alms-house, and having given a false answer as to his place of residence, the presumption arises that he was not a voter, and the vote is fraudulent and should be cast out. (See testimony, pages 283 and 321.) Deducting this

vote, leaves Hungerford's aggregate two thousand seven hundred and fifty-six.

In the western district of the tenth ward seventeen paupers from the county alms-house were brought to the polls and voted the democratic ticket, and for Mr. Hungerford. It is admitted by the stipulation of the parties that but five of these voters were sent to the alms-house from the tenth ward, or were residents of that ward when sent there, and that the remainder came from other towns and wards. Of course, these last-named voters had acquired no residence in the tenth ward, by virtue of being kept at the alms-house at public expense, and they were not legal voters in the tenth ward. Twelve of these votes are already illegal, and being deducted from Hungerford's vote, leaves it at two thousand seven hundred and forty-four.

On comparing the ballots given and received at the poll of the western district of the ninth ward, six or seven democratic votes were found with a pencil mark drawn across the name of Mr. Hungerford and the name of Mr. Shook written in. These ballots were not allowed to either party, for the alleged reason that the name of Mr. Hungerford was not entirely obliterated, and could be read. There can be no question but that these votes were intended and actually cast for Mr. Shook, and should have been allowed and canvassed to him. Adding six of these votes to the vote of Mr. Shook, and the two pasted tickets heretofore referred to, and deduct from Hungerford's vote, increase the vote of Mr. Shook to two thousand seven hundred and forty.

James Parrot, an elector of the western district of the ninth ward, held and offered to the inspectors ten soldiers' votes that had been directed and delivered to him. Two of the votes were opened by the inspectors and deposited in the box. The other eight votes were refused by the inspectors, for the alleged reason that they were not registered, and Parrot was directed to procure the necessary affidavits. This was done by him, and on returning to the polls he attempted again to deposit these ballots. In this attempt he was

defeated by persons who blocked the polls and drove him away, and kept him from reaching the place of voting by force and violence. The witness produced the ballots and envelopes, with the proper power of attorney inclosed, before the committee, and each envelope contained a vote for Mr. Shook. It was proven to the entire satisfaction of the undersigned that these soldiers were all legal voters in the western district of the ninth ward, and were not in the State on the day of election.

These facts present a new question in the history of our election contests. We have no precedent for determining this question, inasmuch as no state of circumstances has ever before existed, under which the question could possibly arise. Ordinarily, votes not deposited in the ballot-box, are not counted for the party claiming them, on the ground of the uncertainty of the evidence as to the actual intentions of the voter, and what might have been the result had his vote been actually cast. In the case of Low and Niven in the Senate, Judge Folger, in his reports remarks, in relation to those who have offered and been prevented from voting, "the power of changing their vote remains with them until it has passed into the box, and we cannot assume that such power would not, in some cases, be exercised." (Senator Folger's report, page 37.)

This reason, which is conceded to be sound in relation to a vote offered by the elector in person, could not apply to the case of a soldier's vote, under the law of this State, in conformity with which it is offered. Although not deposited in the box, it had left the hands of the elector, beyond his recall or power to change or alter it. He had done all that he was required to do, or could do, to exercise his rights, and there is no chance for mistake, nor any doubt as to the party for whom he intended to vote. The ballots, with the power of attorney that accompanied them, were preserved and presented to the committee, and in our hands are now in the custody and under the control of the House.

Somewhat analogous to the principle we would apply to these votes, is the practice of the British Parliament, cited by Senator

Folger, in his report, above referred to, wherein he says, "the parliamentary committees exercise the power of adding to the poll legal votes which have been tendered and rejected. This, however, is under a system of *viva voce* voting. The voter approaches the polling-booth, and the very *tender* of his vote is an announcement of *how* he votes." And in many, if not in most or all cases, the name of the voter is recorded upon the poll-books by the receiving officer, with the name of the person for whom he votes; and in some way, by some mark or designation, it is manifested that his vote is not to be counted in arriving at the result, until the question is settled of his right to vote. But there stands upon the record all that is needed to make a perfect vote as soon as that question is put at rest, the name of the voter and that of the candidate of his expressed choice. There needs no further act on the part of the voter or receiver of votes to make clear the will and intent of the voter. This must be the reason of the power exercised in England to add to the poll "tendered votes." And in one case it would seem, that the tendered and rejected vote was not added to the poll, though ascertained to be legal, because the voter "did not declare his preference; he ought to have declared for whom he voted." ("*Leominster case*, 1,796, 2 *Peckwell*, 168.")

Thus it seems to be settled, that in cases of voting by ballot, and by a *viva voce* vote, different rules are applied and different results prevail; and yet, in both cases, the rule has reference solely to the will and intention of the voter. In the case of voting by ballot, the vote is not counted, for the reason that the voter has in no satisfactory way declared his final intention, and the possibility of a change in his determination before his vote reaches the ballot-box, and is still under his control. In the case of *viva voce* voting, the vote is allowed, because the intention of the voter is declared, and his vote placed beyond the power of being changed or recalled.

In the case we are considering the soldier is in the position of the voter who declares his preference *viva voce*, so far as the rules governing his case are concerned. He has declared his preference in writing, which admits of no possibility of mistake,—has given his

friend a power of attorney to cast his vote, and has placed the ballot beyond his power of recall, or change of intention. The same *reason*, therefore, that allows "tendered votes," when given *viva voce* to be added to the poll, applies with far greater force to the soldier's ballot, under our statute on that subject. We are clearly of the opinion that those eight votes should be allowed to and counted for Mr. Shook, which would increase his aggregate to two thousand seven hundred and forty-eight.

Joseph Artels, an elector, residing in the middle district of the tenth ward, voted for Mr. Shook in the western district of that ward, for the reason, as he alleged, that he was registered in the western district and not in the other. Although a legal voter at the place of his residence, it is conceded that he did not reside in the western district, and under the requirements of the Constitution, his vote in that district was illegal, and should be deducted. This leaves the aggregate vote of Mr. Shook at two thousand seven hundred and forty-seven.

Objection was made by the sitting member to the vote of Stephen W. Thatcher, cast in the town of Knox. It is contended that Thatcher was not of the age of twenty-one years, and not a legal voter. From the declarations of Thatcher, this would seem to be the case, but it is not proven to the satisfaction of the undersigned for whom he voted. He voted a yellow ticket, but the proof that it was one that had been pasted, and was for Shook instead of Hungerford, comes short of establishing that fact; and as he was not called to state how it was, the matter is too uncertain to disturb the return in that respect.

From the foregoing facts and conclusions the following result is deduced:

Number of votes cast and that should be allowed to Joseph Shook	2,747
To O. M. Hungerford	2,744
	<hr/>
Majority for Shook	3
	<hr/> <hr/>

Joseph Shook is, therefore, entitled to his seat by having received the greatest number of legal votes cast at the election in November last.

Second. But another and important question is raised under the second head of the case, made by the contestant. On this point the proof is clear and overwhelming. It appears that from the opening of the polls in the morning, an organized band of lawless men combined to obstruct the polls, and to prevent union voters or those having white tickets from approaching the place of voting. On every attempt to approach the polls, if they were discovered to have white tickets, they were crowded back and driven away by force and violence, and many of them were assaulted and beaten in a cruel and outrageous manner. Some were seized by the neck, their ballots taken from them and destroyed, and the voter driven from the polls. The leaders of these disturbers of the peace were acting under the direct authority of the inspectors of election, under pretense of an appointment as special constables, and in the presence of the mayor; and some members of the police force under his command, claimed authority superior to theirs, and threatened them with violence if they attempted to interfere. It was openly proclaimed by these men that no union votes should be polled on that occasion at that place, while every facility was afforded to those voting the yellow or democratic ticket. It does not appear that a single democratic elector who desired to vote failed of an opportunity to do so. On the other hand, forty-seven persons were called as witnesses, who testified that they went to the place of election to vote, prepared with tickets, and desiring and intending to vote the union ticket and for Mr. Shook. All of these witnesses testified that they were kept away from the polls and prevented from voting by violence and threats. Aside from the danger attending the effort to vote, they found it physically impossible to reach the polls. A crowd of excited and boisterous men, acting in concert, shut up the approaches to the ballot-box, and whenever and as often as union voters came near the place where the votes were received, a rush

was made by the crowd and the whole mass carried away, and often into the street. The place of voting was in a room in the rear of a corner grocery, separated only by a partition through which a door communicated with the common drinking room, where liquor was freely sold and drank during the day, and the votes were taken through a window on the sidewalk. This gave ample room and opportunity for the exercise of the brutal instincts of the leaders of this outrage, and the evidence presents a sickening detail of a transaction that reflects deep disgrace on those who were engaged in the performance, and on the public authorities by whom it was permitted, and especially on those by whom it has been suffered to go so long unpunished.

It is also already evident from the evidence that, in all, more than one hundred persons were prevented from voting at this poll, by the means described, and that a sufficient number were thus deterred from exercising their right of suffrage to have changed the result, even had the majority of Mr. Hungerford been many times the number declared by the board of county canvassers.

It is not claimed that these votes can be counted for Mr. Shook; but it is insisted that the scenes of disorder and violence which prevailed at the poll of the western district of the ninth ward was of such a character as to render the election in that district void, and require that the entire vote be thrown out.

In this opinion the undersigned fully concur. The evidence shows one of the most disgraceful and ruffianly transactions ever indulged in on a similar occasion, by any people claiming to be civilized, or possessing any regard for law and good order. That such a transaction *could* have taken place within the limits of a city like this, and in the presence of the mayor of the city, with an ample police force under his control, is not only amazing, but highly calculated to produce alarming suspicions of complicity in the public authorities in an event so much to be deplored. The whole transaction deserves to be rebuked in a manner that shall be a warning to all who may be disposed to indulge in like proceedings. These lawless

men should be taught the lesson, that when they attempt to control elections by such means, there is a power that can and will correct the evil they would do, and that they cannot profit by any success achieved under such circumstances.

It is fortunate that the legal proposition involved in this branch of the case has been adjudicated and settled. An examination of the following authorities is conclusive as to the power and duty of this body to pronounce the election in the western district of the ninth ward in the city of Albany void, on the ground that the election was interfered with by force, and was not free. Law and Practice of Legislative Assemblies, p. 67; Report of Contested Elections by Cushing, p. 148.

If this view of the case be correct, there can be no question as to the right of the contestant, Joseph Shook, to the seat now occupied by Mr. Hungerford, and the duty of this House to secure to him that right, and to vindicate, at the same time, the right of every citizen to the safe, convenient and peaceable exercise of his duty as an elector.

The undersigned feel gratified in being able to state that the proofs in the case in no manner implicate the sitting member in any of the disgraceful transactions that resulted in securing his election. It is his misfortune to have been supported by such friends; but he will carry with him in his retirement from this body, not only our respect, but our sympathy for the unfortunate situation in which he is placed.

The undersigned recommend the adoption of the following resolutions:

Resolved, That the election held in the western district of the ninth ward of the city of Albany, on the 8th day of November last, is hereby declared void, in consequence of the freedom thereof being interfered with by violence to such an extent as to disfranchise a large proportion of the electors residing in said district.

Resolved, That Jacob Shook by the greatest number of legal votes cast was duly elected a member of the Assembly from the



second district of Albany county, on the 8th day of November last, and is entitled to the seat now occupied by the Hon. Oliver M. Hungerford.

All of which is respectfully submitted.

W. P. ANGEL.

E. EDWARDS.

REPORT OF MR. GLEASON.

To the Assembly of the State of New York:

The undersigned, from the committee on privileges and elections of this body, to which was referred the petition of Joseph Shook, of the town of Guilderland, county of Albany, praying for the reasons therein set forth, that he might be declared elected and entitled to a seat in this body from the second Assembly district of the county of Albany, in the place of Oliver M. Hungerford, now occupying said seat, respectfully reports:

The evidence adduced upon this investigation by the contestant and the sitting member may be considered under two general heads:

First. Evidence relating to illegal or improper votes cast and to irregularities or informalities in the canvass and return thereof.

Second. Evidence relating to the alleged riot or tumult at the polls in the western election district of the ninth ward in the city of Albany on the day of election which, the contestant claims, rendered the election in that district void.

It was shown from the statement of the county canvass in the county clerk's office that Mr. Hungerford had received two thousand seven hundred and sixty-one votes, and Mr. Shook two thousand seven hundred and thirty-two, giving Mr. Hungerford a majority of twenty-nine. (Page 2.)

The return of the western election district of the ninth ward in the city of Albany showed that four hundred and thirty-five votes had there been cast for Mr. Hungerford and one hundred and forty-nine for Mr. Shook. (Page 1.)

The votes which were improperly received or rejected, will be first considered.

PAUPER VOTES.

Thirty-three persons voted from the alms-house of Albany county at the western election district of the tenth ward. (Page 141.)

The Constitution of this State (Art. 2., sec. 3) declares that "For the purpose of voting, no person shall be deemed to have gained or lost a residence * * * while kept at any alms-house or other asylum, at public expense."

The Revised Statutes (Part 1, chap. 6, title 4, art. 2, sec. 21) state that "No person shall be deemed to have lost or acquired a residence * * * by living in any poor-house, alms-house, hospital or asylum in which he shall be maintained at the public expense."

A stipulation was made between the contestant and the sitting member to the effect that all the paupers but five who voted in this district, from the alms-house, had been sent to the alms-house from other towns and wards than the tenth ward, in which the alms-house is situated, and were residents of other towns and wards when so sent. (Page 222.)

Patrick W. Murphy, the clerk of the alms-house, testified that fifteen of these voters were paupers from the alms-house. (Pages 187-194.)

Two of the voters from the alms-house, John Fitzgerald and Roger Kelley, are claimed as legal voters by the sitting member, on the ground that the evidence was not sufficient to establish the fact of their being paupers.

The clerk, Mr. Murphy, swears that Fitzgerald was a nurse in the hospital, and had been so employed since last spring, but received no salary therefor. His wife, who was also a nurse, received a salary. Fitzgerald was on the books of the alms-house as a pauper. (Page 193.)

The same witness states that Kelley had charge of the stock since last spring, feeding the bull and chickens in the summer, and having also charge of the cows in the winter. He was paid no salary for his services, but had received money as a gratuity.

It is very clear that both these persons were paupers.

There is not a poor-house throughout the State where its inmates, who possess the proper physical qualifications, are not required to assist in the household or agricultural duties. To say that such persons, admitted as paupers, and kept as paupers, are voters in the district where the poor-house may be situated, would result in allowing to all the right of voting, save those only who were too infirm to engage in any kind of manual labor. Manifestly this is not the reason upon which the law is grounded. The language of the Constitution, as quoted above, is incapable of misconstruction, and the two persons under consideration, plainly fall within the class of those "kept in alms-house at public expense."

Twelve of these voters are, therefore, to be considered paupers, and had consequently gained no residence in this ward. Their votes are to be rejected.

For whom did they vote?

No positive testimony was offered on this point.

It appears from the evidence given by both parties, that the democratic tickets cast at this election, throughout the Assembly district were yellow, and the union tickets white. (Pages 1-22-242.) Lagrange, one of the inspectors of the polls where the paupers voted, says that they voted the yellow ticket. (See page 173.)

This is further corroborated by the evidence of Cunningham (see page 196), Harrop (see page 200), Burt (see page 200), and others.

Golden, the keeper of the alms-house, was a democrat, and electioneered at the polls for that ticket. (See page 186.) He gave permission to the paupers to go down and vote. (See page 194.)

The undersigned is of the opinion that these facts are sufficient to warrant the conclusion that the paupers voted the democratic ticket. They were under the keeping of an active politician of that party, were by him allowed to go to the polls and vote, and cast ballots of the same color as the regular democratic tickets. Though scratched and pasted tickets were used, yet, there is no evidence to show that any such altered ballots were cast at this poll; and

if there were, it would rest with the sitting member to show that these paupers cast such exceptional ballots, when the presumption was all the other way. (See report of Judge Folger, in the case of Low and Niven, page 48.)

Twelve votes are, therefore, to be deducted from the number given for Mr. Hungerford.

PASTERS.

At the canvass of the votes taken at the western election district of the ninth ward, two Assembly tickets were found having Mr. Hungerford's name upon them, but containing pasters with Shook's name thereon. The only evidence relating to these tickets is given by Mr. Stempel, one of the inspectors. (Page 88.)

He states that two of the Assembly tickets that had been pasted had come off, and were inside of the other tickets, and that these that were inside were the republican tickets; that Shook's name had been pasted over that of Hungerford's, and that the pasters were found loose in the paper where they had come off. These tickets were counted for Mr. Hungerford.

It is well settled by our courts, that the intention of the voter may be inferred from his acts. (*People v. Saxton*, 22 N. Y. 309; *People v. Cook*, 4 Seld. 67.)

Here there can be no mistake as to the intention. Manifestly, if these voters intended to cast their ballots for Mr. Hungerford, no pasters with Mr. Shook's name thereon would have been found in them. The only reasonable explanation that can be given is that the votes were given for Mr. Shook, and that the pasters had become detached before the ballots were canvassed.

Two votes should consequently be deducted from the number returned for Mr. Hungerford, and added to that returned for Mr. Shook.

NONRESIDENTS.

Several votes claimed to have been cast for Mr. Hungerford, were attacked on the ground that the parties giving them were not residents of the district where they voted.

Willis Van Wagner. It was shown that Mr. Van Wagner, who was a single man, had boarded at Foland's hotel in the eastern district of the ninth ward, for more than a year before election. On the 12th of October he visited Schoharie to attend a fair. He went into his uncle's bank there, with the understanding that he was to succeed the cashier in case a vacancy, which was contemplated, occurred. He came to Albany on the 18th or 20th of October, sold out his desk, gave up his desk room at Weidman's store, where he had been carrying on a commission business, paid his bill at Foland's, and took his trunk with him to Schoharie. His old account books were left at the store, and some clothing at Foland's. He directed his washing to be sent to Schoharie by express. On the 11th of November he concluded the arrangement with the bank at Schoharie, and has remained there ever since. (See pages 166-221-365.)

He voted the democratic ticket in the eastern district of the ninth ward. (See page 165.)

Van Wagner himself says that he had no intention of remaining permanently in Schoharie until he effected the arrangement of November 11th. In coming to a conclusion as to his residence on election day, he seems to have been guided by what Cushing terms "the popular notion that a man, having once become a voter, must always afterward have a right to vote somewhere, and consequently, that he retains a right to vote in one place until he acquires it in another, which is wholly unfounded." (See his testimony, page 365.)

Van Wagner was not a resident of the district where he voted and his vote should be deducted.

John Titus. It is shown that Mr. Titus, who was a single man, had been boarding at John Aley's, in the western district of the ninth ward. He left from one to two weeks before election, saying that he was going to West Albany to work for a Mr. Fox, and desired his trunk to be sent there, which was done within a day or two. He did not return to Aley's again. His washing continued

to be done in Lafayette street, in that district, until after election. Titus does not seem to claim that he had a residence at Aley's on election day, but says he intended to come back and board somewhere in the district, and that he considered that district his home. (Pages 207-212.)

He voted for Mr. Hungerford in this district. (Page 209.)

This vote should be deducted. Titus had no residence in the district where he voted. His general intention of making that ward his home avails him nothing. He admits that he had given up his residence at Aley's, and had not secured any other.

"Inhabitaney and residence mean a fixed and permanent abode or dwelling place for the time being, as contradistinguished from a mere temporary locality of existence." (8 Wend. 140.)

The vote of Charles Lewis, a soldier, cast by Mayor Perry, was attacked on the ground of his not being a resident of the eastern district of the ninth ward when the ballot was cast. (Page 259.)

There is no evidence to show how Lewis voted. (Page 268.) It is, therefore, not deducted from Mr. Hungerford's vote.

Thomas B. Laraway voted at the western district of the tenth ward. His residence was entered on the poll-book by the clerk as being at the alms-house. (Page 168.)

The clerk of the alms-house says that no such person lived there. (Page 189.)

This was at best but a mistake or an irregularity on the part of the poll-clerk. Certainly, it is no good reason for rejecting the vote of Mr. Laraway. (People v. Cook, 4 Seld. 67.)

This completes the list of votes given for Mr. Hungerford, attacked by the contestant.

We now come to the votes which should be allowed to or deducted from the number returned for Mr. Shook.

WRITTEN TICKETS.

On canvassing the votes cast in the western district of the ninth ward, several Assembly ballots were found, from which the name of Mr. Hungerford had been erased, and that of Mr. Shook in-

serted upon them in pencil. Stempel, one of the inspectors, says that eight such tickets were found, of which two only were allowed for Mr. Shook, and the remaining six were not credited to either party. Griffin, another of the inspectors, says that seven or eight such tickets were found, and one only allowed for Mr. Shook, and that the remainder were not allowed to either.

Both agree that the name of Mr. Shook could be seen on all of them, and that the name of Mr. Hungerford had been erased. The reason given for rejecting these ballots entirely was, that Mr. Hungerford's name had not been thoroughly erased, and the name of Mr. Shook had not been legibly written, though it was admitted that it could be made out. (Pages 13, 224.)

These ballots, to the number of six, should be counted for Mr. Shook. Even had the name of Mr. Hungerford not been erased at all, still the votes should have been counted for Mr. Shook.

The intention of the voter is clearly manifest here. When an instrument is partly printed and partly written, the printed part must yield to the written part. (*Harper v. Albany Ins. Co.*, 17 N. Y. 198; *People v. Saxton*, 22 N. Y., 309.)

SOLDIERS' VOTES.

James Parrot had ten soldiers' votes to deposit in the western district of the ninth ward. He voted himself and then handed up two of these soldiers' votes, which were received and deposited. Upon offering the third, the inspector refused to receive it, on the ground that the soldier was not registered, and directed Mr. Parrot to obtain the necessary affidavit, and also the outer envelope. It nowhere appears that Parrot offered the inspector any of the remaining seven votes. Parrot went away, got affidavits of residence for all of the soldiers, and also the outer envelopes, and returned to the polls, but was unable again to reach them by reason of the crowd and confusion. (See pages 26-28.) Some of the soldiers, whose votes Parrot did not cast, were registered. (See register of that district.) All of them were shown to be residents of the district and absent in the army. (See page 218.)

The eight soldiers' votes are produced and found to be in all respects regular. Parrot swears that he opened them on the day after the election, and that each one contained a ballot for Mr. Shook. (See page 27.)

The undersigned is of the opinion that these votes were not properly presented to the inspector by Mr. Parrot. The inspector was right in refusing to receive a vote where the name of the party voting it was unregistered unless the affidavit required by the law was furnished. He was not bound to know what other votes Mr. Parrot had, nor does it appear that any more of them were offered by him. Had he been tendered the votes of the four soldiers which were registered, a different question would have arisen, which it is not necessary now to discuss. In this view of the case, none of these votes can be allowed to Mr. Shook, but they become important in another respect, as will be hereafter seen.

Several votes given for Mr. Shook were attacked by the sitting member, as follows:

Joseph Artels. He resided in the middle election district of the tenth ward, and voted in the western election district of the same ward. (Page 386.) *He voted for Mr. Shook.* (Page 386.) His vote should be deducted. The Constitution declares (article 2, section 1): "Every male citizen, etc., shall be entitled to vote * * in the election district of which he shall at the time be a resident, and not elsewhere."

Ephraim Lassure. It is claimed that he was a non-resident of the eastern election district of the ninth ward, where he voted. He was a married man, and lived, in July last, with his family in this district. During that month he went to North Adams, in Massachusetts, to work. His family moved to some other part of the city, but where, it does not appear. They lived in the city on election day. Lassure continued at North Adams until election day, when he returned and voted. (See pages 373-377.)

It is alleged that he told Mr. Woolley on the morning of election that he had not come here to vote, that he kept house in North

Adams, and had no vote here. (See page 377.) Another witness (Goodwin) says that he challenged Lassure's vote at the polls; that Lassure said he had a right to vote, as his family lived here; that afterwards he confessed he was not entitled to vote, and went away, but returned and voted. (See page 379.)

This vote should not be deducted. The presumption is that Lassure's family still continued to reside in the district, and that he was a legal voter there. This presumption must be overthrown by the sitting member before the vote can be rejected. Lassure's absence on business did not change his residence. His statements are contradictory, and leave the question to be determined by the facts proved. (*Williams v. Whiting*, 11 Mass. 424; *Jennison v. Hapgood*, 10 Pick. 99; *People v. Pease*, 25 Howard, 511.)

He voted for Mr. Shook. (Page 382.)

Morgan L. Schermerhorn. About two years ago Mr. Schermerhorn obtained a position as clerk at Washington. His family remained in Albany in the eastern election district of the ninth ward. During the spring of 1864 Mr. Schermerhorn's wife died, when he broke up housekeeping and sold off the most of his furniture. The few articles of furniture which he retained were stored partly at Charles W. Ford's, who lived in the next house to the one formerly occupied by Mr. Schermerhorn, and partly at Dr. William L. Ford's, the father of Charles W. Ford. Dr. Ford lived in the middle election district of the ninth ward.

Mr. Schermerhorn also boarded his two children at Charles W. Ford's, and stated when he thus broke up housekeeping that "this should be his residence always; that though he clerked it at Washington, yet he should call this his home."

Mr. Schermerhorn came on from Washington about a month before the election, and boarded with Dr. Ford. He voted in the middle election district of the ninth ward. (See pages 374-401.)

It is claimed that Mr. Schermerhorn was not a resident of Albany, or at least not a resident of the district in which he voted.

His vote should not be deducted. The evidence shows that Mr. Schermerhorn had never lost his residence in the ninth ward. This

being admitted, the only remaining question to determine is whether he voted in the election district in which he at the time resided. Clearly, he resided at Dr. Ford's, and was therefore a legal voter in that district. Though he may have held Charles W. Ford's to have been his home till this last return before election, yet his conduct then showed his purpose of making Dr. Ford's his home. (*Crawford v. Wilson*, 4 Barber, 504; *Fitchburgh v. Winchersdon*, 4 Cush. 190.)

He voted for Mr. Shook. (See page 380.)

Jacob Sterling. Mr. Sterling was a single man who had heretofore made his home at his mother's, in the town of Knox, when out of employment. During the past summer and fall he worked for his uncle, who lived in the town of Guilderland. He voted in the town of Knox at the election. After election he was warned out by the overseer of the highways of Knox to work on the roads as a resident of that town. He then said that he would not because his home was in Guilderland. (See pages 393, 394.)

This loose assertion by Sterling in order to avoid the payment of a tax is insufficient to counterbalance the facts shown. His mother's house was evidently his home. There he spent his leisure time. In that town he voted. His neighbors considered it his home. (*Lincoln v. Hapgood*, 11 Mass. 350.)

He voted for Mr. Shook. (Page 387.) His vote cannot be deducted.

Stephen W. Thatcher. He voted at the second election district in the town of Knox. While the board of registry for that district were sitting he told Mr. Wood that he was not old enough to vote. (See pages 394, 395.)

For whom did he vote?

Mr. Warrick prepared a set of democratic tickets with union pasters for Thatcher. He thinks, but is not sure, that Shook's name was pasted over Hungerford's. (See page 371.)

Mr. Whipple also had a set of pasted tickets prepared in the same way by Mr. Warrick. He rode from Warrick's store to the polls with Thatcher. (See page 397.)

Mr. Wilber, one of the inspectors, took Thatcher's State and electoral tickets at the polls to deposit in the box. He noticed at the time something unusual in them, that they were stiffer and harder than others. They were yellow in color. (See page 396.)

Mr. Finch, another inspector, who took Thatcher's Assembly ticket, says that it was yellow, and that he did not notice whether it was thicker than usual or seemed to be pasted. Two yellow tickets with Shook's name pasted on, were found in the Assembly box. (See page 387.)

Although the evidence is circumstantial, yet the undersigned is satisfied that Thatcher voted for Shook, and this ballot should therefore be deducted.

Chester Sitterly and James Van Wormer were soldiers in the army, and their ballots were cast in the third election district of the town of Guilderland. (See page 399.) It was shown that they did not reside in that town. (See page 363.)

Neither of them voted the Assembly ticket. (See page 400.)

Theodore Doney removed from the first to the second election district of the town of Knox, two or three days before election. He voted the union ticket in the second district on election day. (See pages 372, 387, 397.)

He was clearly a legal voter. (See Constitution, art. 2, sec. 1.)

We have, then, the following summary:

Hungerford's vote	2,761
Deduct pauper's vote	12
Deduct pastors	2
Deduct Van Wagner's vote	1
Deduct Titus' vote	1
	<hr/> 16
Remaining	<hr/> 2,745 <hr/>

Shook's vote	2,732
Add written tickets	6
Add pasters	2
	<hr/>
	2,740
Deduct Artel's vote	1
Deduct Thatcher's	1
	<hr/>
	2
	<hr/>
Remaining	<u><u>2,738</u></u>

Leaving a majority of seven for Mr. Hungerford.

But a far more important question remains to be determined.

Was the election in the western election district of the ninth ward void by reason of the riot and tumult which occurred there on election day?

This was the part of the case to which the attention of the committee was especially directed, and upon which the most of the evidence was given.

That an election may be declared void by either branch of the Legislature on account of the riot disturbance or tumult attending the same, is well settled by the authorities.

"Whenever the freedom of election is violated by any riot, disturbance, or tumult at the polls, by which the proceedings are actually interrupted; although the returning officer may not thereby be prevented from completing the poll and making a return, the election will be void.

"A riot may proceed by actual force or violence or by a display of numerical strength, accompanied with threats; and though no actual violence take place, yet, if the conduct of the parties engaged is of such a character as to strike terror into a man of ordinary firmness, and to deter him from proceeding to the poll, the election can hardly be said to be free.

"It is necessary, also, to the existence of such a riot as will avoid an election, that it should be founded on system, or, at least, upon

premeditation; for a casual affray, or an accidental disturbance, without any intention of overawing or intimidating the electors, cannot be considered as affecting the freedom of elections.

“And when the proceedings at an election are interrupted by riots, the election will be held void, without reference to the number of votes thereby affected.” (Cushing’s *Law and Practice of Legislative Assemblies*, p. 68.)

The right of every citizen to vote is guaranteed by our Constitution. (Art. 2, sec. 1.) And that this right may be fully protected, it is provided by our laws as follows:

“The board of inspectors shall possess full authority to maintain regularity and order, and to enforce obedience to their lawful commands, during an election, and during the canvass and estimate of votes, after the closing of the poll; and shall have full authority to preserve peace and good order at and around the polls of the election, and to keep the access thereto open and unobstructed; and may appoint one or more electors to communicate their orders and directions, and to assist in the performance of their duties in this section enjoined.” (Rev. Stat., part 1, chap. 6, tit. 4, art. 3, sec. 32.)

The inspectors have likewise authority to deliver into the custody of the sheriff or any constable, whoever may disobey their commands, or conduct in a disorderly manner. (Sec. 33.)

What are the facts in the case before us? Was the election orderly in its character? Was it attended merely by a large number of politicians, active and ardent in their preferences, it may be, but who confined themselves to legitimate and proper arguments to induce voters to support their respective candidates?

Was the only inconvenience that usually resulting from a heated election, where many are seeking to exercise the privilege of the elective franchise? Or was there a deliberate, determined purpose, preconcerted or not is immaterial, to prevent persons of a particular party from voting for their candidates? Was this purpose carried into effect by means of threats, of intimidation, of wounds, of blows, and all the concomitants of a savage and brutal affray?

Was this violence cloaked and sanctioned by assumed forms of law? Let the evidence answer.

We cannot fail to conclude that riot, tumult and violence did prevail at this poll, so that the election, in no sense, can be considered free, but should be declared void.

In coming to this conclusion, it is not necessary to assume that any design to produce the result was manifested in having the democratic ticket of a peculiar color, or in the police arrangements.

But it must be confessed that the conduct of the board of inspectors was exceedingly reprehensible, and tended in a great degree to produce the painful consequences of the day. They began by selecting a body of special constables all of one political persuasion, and ardent partisans, who assumed throughout the election to have supreme and entire control over the polls, even to the exclusion of the police.

But one of these "specials" was placed on the stand, but his evidence was conclusive as to the nature of the service performed by him, and the duties he thought himself required to fulfill. He was foremost in every deed of violence that transpired during the day, and evidently prided himself on the thoroughness of his exploits. When those who are commissioned to preserve order and to protect the rights of every citizen to vote are themselves the first to trample upon that right, the result can be easily predicted. It does not appear that the inspectors troubled themselves particularly about these proceedings outside, except that they now and then remonstrated with the more turbulent.

The polls were held in the same building with a drinking saloon which was kept open during the election. The voters came up to a window opening on the street, and handed their ballots to the inspectors who were inside.

Ninety-eight witnesses were called to speak of the proceedings at these polls. Over ninety concur in stating that a great deal of violence was used and characterized it in terms more or less emphatic. These witnesses comprise persons of the first respectabil-

ity in the city, and of both political parties. Whether a concerted plan was formed in advance is immaterial. The testimony clearly shows that some concert of action existed between the chief rioters throughout the day. That these obstructions were not simply the result of a crowd is manifest from the discrimination shown towards the voters. Not a democrat was prevented from casting his ballot, while thirty-nine attempted to vote union tickets but were unable. Thirty-two of these were registered, and the remaining seven were shown to be legal voters. Nine were cut in the limbs and eleven were struck. All of the persons thus injured were members of the union party. Only one democrat was wounded and he but slightly. Whenever persons holding the union ticket were seen near the polls, the cry of "open the polls" would be raised, and the whole crowd swept out into the street. The inspector, Connors, manifested his partiality by repeatedly receiving democratic votes from persons standing further from the polls than those offering union ballots. When Mayor Perry arrived, about two o'clock in the afternoon, he made some slight efforts to restore order, and give an opportunity for all to vote. His own language and acts, in the opinion of the undersigned, are strong proofs of the existence of a turbulent and riotous state of affairs, too great to allow of a fair election. These efforts were soon suspended and the disorder continued till the polls closed.

Repeated threats and insults were addressed to prominent members of the union party, and to others who were seeking to reach the polls for the purpose of depositing union ballots.

It is alleged that men connected with the union party were likewise guilty of breaches of the peace. The only evidence to sustain this allegation is that concerning Stackhouse who drew a pistol and was arrested. The proofs show that Stackhouse did not draw his pistol till he had been himself attacked, and that afterwards some one snapped a pistol aimed at his head.

Whether the state of things testified to as existing at these polls was sufficient to render the election void, is, of course, a question of fact, which each member of the Assembly is to decide for himself.

The undersigned is fully convinced that under the authorities already quoted, such was the case. It is conceded that no direct precedent exists for this procedure in our own State, but the general principles applicable to the election laws, the decisions of other States and above all our own sense of right can easily determine the question for us.

Judge Willard, in the case of the People against Cook (4 Seld., page 69), speaks as follows:

"I do not intend to assert that there may not be departures from the statutory requirement with respect to the time of opening and closing the polls, and with respect to some other matters which would put in hazard the whole vote of the district.

"It is probably impracticable to prescribe a rule which will enable us to determine, in all cases, what irregularities of the inspectors will vitiate an election. It may be safely affirmed, that if the irregularity does not deprive a legal voter of his right, or admit a disqualified person to vote; if it casts no uncertainty on the result, and has not been occasioned by the agency of a party seeking to derive a benefit from it, it may be overlooked. There is nothing in the principle which holds out the slightest imitation to disorder at the polls. Should a gang of rowdies gain possession of the ballot-box, during or after the close of an election, before the canvass, and destroy the whole or portions of the ballots, or introduce others surreptitiously into the box, so as to render it impossible to ascertain the number of genuine ballots, the whole should be rejected." (People against Cook, 4 Seld. page 93.)

But it is urged that if this poll be declared void, the vote of the whole Assembly district should be thrown out, and a new election ordered. This course has been adopted in nearly all the cases given in the books, but the circumstances of these cases differ materially from the one under consideration. There the candidates were chosen from one election district alone. Clearly, if the election in that district was void, a new election must be ordered. Here a large number of districts united in the election of the same member

of Assembly, and it would be in the highest degree unjust to the remaining districts where the election was conducted in a quiet and orderly manner to disfranchise them for the misconduct at one of these districts. What then shall be the effect of this disturbance upon the vote cast at this poll? Two courses are open.

Mr. Parrot testifies (page 26) that he returned with the eight soldiers' vote to which reference has already been made, and the proper affidavits for all of them. By reason of the crowd he was prevented from reaching the polls and depositing such votes. Now, it has been well settled that when a legal voter has been prevented from voting, evidence cannot afterwards be received as to the manner in which such a person would have cast his ballot if he had been permitted to vote. (In re L. J. R. R. Com. 19, Wend. 37, Hartt v. Harvey, 32 Barb. 55.)

We cannot, therefore, say that because thirty-nine persons swore that they would have voted for Mr. Shook had they not been prevented, therefore these votes should now be counted for him. The law in all cases presumes a *locus penitentiae* till the ballot is actually cast. But does the rule of law and the reason of it apply to the case of the eight soldiers' votes held by Mr. Parrot? The undersigned thinks not, and for the following reasons:

This act of voting, under the law of 1864, was fully completed, so far as the soldier was concerned, in the camp. He had expressed his choice, and the ballot had passed from his control. The law provided a way by which that voter's ballots should reach the polls, but no change of intention could alter this vote as far as the particular ballot was concerned. No *locus penitentiae* here existed. No doubt of the voter's intention can be found. All that has been settled, and the mechanical act of depositing the ballot in a particular box only remains.

It may be urged in reply that the soldier might have returned home on or before election day—that he might send other ballots. But these reasons would have applied with equal force to have excluded every soldier's vote which was cast. The point is a novel

one, but to the undersigned it seems clear that as the reason of the old rules of law here fails, the rule itself must fail also.

Eight votes for Shook were then excluded by this display of force, which we can properly count for him under this view of the case, and which would elect him by one majority.

The undersigned, however, goes further, and holds that the entire vote of this district should be rejected.

To determine what amount of riot and tumult shall invalidate an election, we are not obliged to resort to extreme cases as guides. A man is not compelled to endanger his life, or to incur risk of bodily injury before he shall forbear his efforts to vote.

An orderly, quiet election is the right of every one, and the inspectors do not want for powers to assert such right. If they fail of discharging this duty through willful or casual neglect, the consequences must rest upon the people of the district. Such a display of violence as to deter men of ordinary firmness from proceeding to the polls, and not merely casual in its nature, will be abundantly sufficient to warrant the supreme legislative power in declaring all the proceedings had at that poll void. That such a state of affairs existed at these polls throughout the greater part of the day no one can doubt.

It is a harsh remedy to apply, but this remedy is the only one which will strike at the root of the evil. It is only in the last resort that any portion of the community should be disfranchised, but when that community have actively or tacitly aided in disfranchising a portion of their own citizens, the punishment should follow.

By a long and bloody war we have sought to maintain the right of every citizen freely to express his opinion at the ballot-box, and to enforce the doctrine that the will of the majority, properly expressed, shall be the law of the land. Surely at this crisis, above all others, it is unbefitting for us to sanction those evils, similar in character, and differing only in degree, which we have sought to blot out, even at the cost of treasure and life.

Such crimes against society, when unrebuked, become contagious, and sooner or later undermine the fairest and the firmest structures of government.

The result of the election would then be as follows:

Hungerford's vote	2,761	
Deduct vote of this poll	435	
		<hr/>
		2,326
From this take paupers' vote	12	
From this take Van Wagner's vote	1	
		<hr/>
		13
		<hr/>
Balance	2,313	
		<hr/>
Shook's whole vote	2,732	
Deduct vote of this poll	149	
		<hr/>
		2,583
From this take Artel's vote	1	
And Thatcher's vote	1	
		<hr/>
		2
		<hr/>
		2,581
		<hr/>

Thus electing Mr. Shook by a majority of 268.

The undersigned therefore recommends the adoption of the following resolution:

Resolved, That Joseph Shook was, at the last general election, duly elected a member of this body from the second Assembly district of the county of Albany, and that he is entitled to the seat now held by Oliver M. Hungerford.

Respectfully submitted.

W. H. GLEASON.

April 6, 1865.

(See testimony accompanying said reports, pages 1 to 403.)
 Assembly Documents, 1865, No. 132; Assembly Journal, 1865,
 page 1115.

REPORT OF MINORITY OF COMMITTEE.

ASSEMBLY CHAMBER, *April 8, 1865.*

Mr. Veeder, from a minority of the committee on privileges and elections, to which was referred the petition of Joseph Shook, that he may be awarded the seat now occupied by Hon. O. M. Hungerford, reported in writing, adversely thereto:

IN ASSEMBLY, *April 8, 1865.*

REPORT OF THE MINORITY OF THE COMMITTEE ON PRIVILEGES
AND ELECTIONS, ON THE CONTESTED SEAT IN THE SECOND AS-
SEMBLY DISTRICT OF ALBANY COUNTY.

To the Assembly of the State of New York:

The undersigned, a minority of the committee on privileges and elections, to which was referred the petition of Mr. Joseph Shook, claiming the seat now held by Mr. O. M. Hungerford, respectfully report:

That a large portion of the time of this committee, during the present session, has been spent in taking testimony and hearing the arguments thereon, in this case; but the undersigned deem it necessary only to state enough to present the leading features of the controversy, and such parts as shall enable the Assembly to decide justly on points on which the members of this committee are divided in opinion.

The total vote given for Mr. Hungerford, as appears	
from the returns, was	2,761
For Mr. Shook	2,732

Making a majority for Mr. Hungerford of	29 votes.
---	-----------

It is claimed, on the part of the contestant, that certain illegal votes were given for Mr. Hungerford which ought to be deducted, but all the votes claimed to be illegal, which were actually cast for Mr. Hungerford, if deducted, would not overcome the majority of twenty-nine above stated.

We purpose briefly to state the claims made, and our conclusions upon the evidence.

It is alleged on the part of the contestant, that twelve inmates of the alms-house voted in the western district of the tenth ward, who had not, before they were sent to the alms-house, a residence in that election district.

As to ten of these, there is no necessity for a critical examination, because these being deducted, can in no respect affect the result. We purpose, therefore, without discussing either the question of fact as to how they voted, or the questions of law involved, to concede a deduction of ten votes from the aggregate vote of Mr. Hungerford.

But as to two others of the alleged paupers, viz.: John Fitzgerald and Roger Kelly (page 193 of the testimony) no deduction should be made, because the evidence shows that they were employed, the former as a nurse in the hospital, and the latter as a keeper of the stock, and they were not, therefore, supported at the public expense.

By the express terms of the statute (1 R. S., 5th ed., 431), it is only when a person is "maintained in an alms-house, hospital or asylum, at the public expense," that he fails to gain a residence by becoming an inmate.

The next claim by the contestant, that at the canvass of the votes for Assembly in the western district of the ninth ward there were six tickets on which Mr. Shook's name was written, and Mr. Hungerford's printed. It appears that the writing was by no means plainly legible, nor was there any satisfactory evidence of a design to erase the printed name, and that it was proposed by *Mr. Strempel, the republican member of the board of inspectors*, that these six votes should *not* be counted for either candidate, and that this suggestion was adopted.

It is now proposed, without the presence of these votes, and with much less opportunity for ascertaining the intention of these voters, to count these nine votes for Mr. Shook.

The undersigned cannot acquiesce in the justice of this proposition; but as it is a matter that might lead to extended discussion,

and can in no way affect the result, they propose to concede these six votes to Mr. Shook.

It is next claimed on the part of the contestant, that in the canvassing the Assembly votes in the northern district of the ninth ward, two printed pasters with the name of Mr. Shook on them were found loose in two tickets on which Mr. Hungerford's name was printed, and that these two votes, which were counted for Mr. Hungerford, should be deducted from the aggregate vote of Mr. Hungerford and added to the vote of Mr. Shook, thus making four votes difference in the result. The undersigned cannot concur in the allowance of such a claim. There is no evidence whatever that the pasters had ever been affixed to the face of the printed ballots, nor that either the ballots or the pasters indicated by their appearance that they had been so affixed. Certainly the paster alone was not a legal ballot within the requirements of the statute, and it can gain nothing by being placed, either accidentally or otherwise, within a legal ballot unless affixed to the ballot, and covering the name printed on the ballot. It certainly indicates no intention on the part of the voter to alter the ballot. The undersigned cannot therefore concur in the justice of this claim.

Willis Van Wagner voted for Mr. Hungerford in the eastern district of the ninth ward, and it is charged by the contestant that he was, at the time, and had been for several days previous, a resident of Schoharie. This claim seems, to the undersigned, to be so plainly wrong that they would fail of their duty if they did not show its fallacy. The contestant relies mainly on proof made by Mr. Peter Foland, that on the 24th of October, Van Wagner, who had been boarding at his house in the eastern district of the ninth ward, left his house for Schoharie, and told him "he had hired out to his uncle to clerk it in the bank there" (page 165); but, on his cross-examination, the witness made a statement materially different as to what Van Wagner said on leaving (page 167). That he left town about two weeks before the election, was also proved by Mr. Weidman, and was not controverted. But the question

was, when he ceased to be resident of Albany and become a resident of Schoharie? To this point Mr. Van Wagner himself testified (pages 365, 366) that he had resided in Albany more than a year before the last election, and resided there on the last election day.

That he went to Schoharie, before the election, on a visit to attend the fair, and had remained there, at the suggestion of his uncle, Judge Goodyear, in the hope of obtaining the place of cashier in the bank of his uncle, in case Judge Goodyear's son, who then occupied that position, should conclude to accept an offer to go into business in the city of New York.

That he was not employed to remain in Schoharie until after the election and on the eleventh of November, and that on the morning of the day of the election, as he was starting to come to Albany, he applied to his uncle to inform him whether he could give him the place and his uncle told him he had not decided and did not know whether he should want his services or not, but would ascertain in a few days (page 366). Mr. Van Wagner testified that he did not form the intention of becoming a resident of Schoharie until after the election; that when he went to Schoharie, before the election, he left clothing and his washing at Foland's, and books and accounts at Weidman's store in Albany, and that he settled for his washing as usual when he came to Albany on election day; that he received nothing for any services rendered in Schoharie before the election.

It further appeared that Mr. Van Wagner did not vote at the town meeting at Schoharie this spring, because he had not been a resident there four months, though it would have been four months if his residence had begun there at the time he went there before the election. (Page 371.)

In the opinion of the undersigned Mr. Van Wagner was as clearly entitled to vote in the district where he voted as any other resident in that district, and for authority on this point the undersigned beg leave to refer to the report made to the Senate, in the *Low and Niven* case, by Mr. Folger at page 54, where he says:

"The true conclusion from a consideration of all the cases would seem to be that the residence or inhabitancy which will qualify a person to vote, is a present settled, fixed abode, with no intent entertained to change the same until a fixed time then in the future. That not only must there be intent to give up or to take up a residence but there must be action towards it. The mental determination, and the bodily execution of the decision of the mind, must both concur; and further, that there can be but one residence at a time; one residence cannot be acquired until a former residence is lost nor can one be lost until another is acquired. (2 Kent's Com., 574, 10th ed., note E; *Crawford v. Wilson*, 4 Barbour, 504, 518.)

"For himself, the undersigned (said Mr. Folger), in this investigation, has been disposed to look especially for the intent as the chief solvent of a conflicting or a doubtful array of facts, and in looking at the intent to rely more upon the testimony of the voter himself when that could be obtained, and when the voter seemed a fair and candid witness than upon any other evidence in the case."

John Titus, who also voted in the eastern district of the ninth ward for Mr. Hungerford, is objected to as not then residing in that ward, and it is claimed by the contestant that his vote should be deducted. But in the opinion of the undersigned, the evidence (page 210) brings him clearly within the rule stated by Senator Folger and his vote was legally cast.

Two others, Thomas B. Laraway and Charles Lewis, are also objected to by the contestant, but on pretenses so entirely frivolous that all the committee agree that the objection is unfounded.

This is the extent of all the deductions that it is claimed on the part of the contestant ought to be made from the votes actually given for Mr. Hungerford.

The undersigned find from the evidence that five illegal votes were given for Mr. Shook which ought to be deducted, as follows:

Joseph Artel voted in the western district of the tenth ward, and he testified that he was not at the time a resident of that district.

Stephen W. Thatcher voted in the second election district of the town of Knox, who was at that time a minor. As to these two voters, Artel and Thatcher, the undersigned understand that all the committee agree that these votes should be deducted.

Jacob Sterling voted also in the second district of Knox, who is proved to have been at the time a resident of the town of Guilderland. (See pages 393, 394.)

Morgan L. Schermerhorn voted in the middle district of the ninth ward of the city of Albany, and the evidence that he was at that time a resident of the eastern district of that ward, or of the city of Washington; at all events the proof is clear that he did not reside in the district in which he voted, and had never resided there. (See pages 374, 377, 401, 402.)

Ephraim Lassure voted in the eastern district of the ninth ward, when it was plainly established that he was at the time a resident of North Adams, in the State of Massachusetts. (See pages 610, 377, 378, 379, 380.)

Of the votes therefore actually cast, if you deduct from	
those certified for Mr. Hungerford.....	2,761
The alms-house votes.....	10
	<hr/>
He will still have.....	2,751
	<hr/>
And if you add to the votes certified for Mr. Shook.....	2,732
The six written votes.....	6
	<hr/>
Mr Shook will have.....	2,738
And then deduct the five illegal votes above stated.....	5
	<hr/>
He will have.....	2,733
Which deducted from the votes of Mr. Hungerford.....	2,751
	<hr/>
Leaves still a majority for Mr. Hungerford of.....	18
	<hr/> <hr/>

It is further claimed on the part of the contestant that some soldiers' votes ought to be allowed as if cast in the western district of the ninth ward.

It is shown that James Parrot came to the polls and, after voting himself, offered two soldiers' votes, which were received; that he then offered the vote of another soldier who was not registered, and objection being made he retired to procure the necessary affidavits of residence. Parrot had in his possession at the time seven more soldiers' votes that he intended to offer in addition to the one objected to, eight in all, he afterward procured the affidavits or residence, but did not again offer to the inspectors the vote that had been objected to, nor did he, at any time, offer to the inspectors the other seven soldiers' votes.

Now upon what pretense is it that votes not even offered to the board of inspectors can be counted and canvassed the undersigned do not comprehend.

No rule is better settled than that no votes can be counted unless they have actually *been received and put in the ballot-box*.

In the contested election of Low and Niven that rule was rigidly enforced, and the Senate committee refused to allow legal votes which had been improperly rejected by the inspectors, though they had been offered to the inspectors, and had been actually placed in their hands.

Senator Folger said on page 37 of his report: "The actual result of an election must be declared from a counting of the votes *actually received*. The right of any tribunal to review the determination of the boards of canvassers and to adjudge that the person found elected by these boards was not in fact elected, and that instead of him another person was really elected, must be confined to adjudging this upon the votes *actually received into the ballot-box*."

"But it would be too vagabond and unsafe a power for a tribunal of review to exercise, to inquire for whom the electors would have voted in case their ballots had reached the boxes. The power of

changing their votes remains with them until it has passed into the box, and we cannot assume that such power would not, in some cases, be exercised."

And he proceeds to show why, in England, a vote tendered may be counted. It is because the vote there is *viva voce*, and a tender of his vote is, of course, an announcement of it. Mr. Folger further says, on page 38: "That the vote by ballot does not declare his choice until the ballot has passed from his control and has gone into the ballot-box;" and he refers to different authorities in support of his opinion.

It was agreed by the counsel for the contestant that this view was not applicable to soldiers' votes, and it was said that the soldier had exhausted all his control over his ballot when it left his hands.

But this argument is plainly erroneous. The soldier has the legal right to stop and to supersede by a new power of attorney the vote he has prepared after it has left his hands. He may appear personally at the polls and exercise the right of casting a personal vote in preference to his previously prepared printed vote if he chooses to do so.

His right to control does not cease till his ballot is placed in the ballot-box.

Indeed the person holding the soldier's ballot and presenting it to the board of inspectors, is only the agent of the soldier, and all his acts are, in law, but the acts of the soldier himself.

If soldiers' votes, duly prepared, but not offered at the late election, may now be counted, it is thought many hundreds, and perhaps thousands, will appear as candidates for allowance on the proposed new canvassing with quite as good a claim as that now made in behalf of these eight votes.

One other question remains to be considered by the undersigned.

It is alleged by the contestant that the poll of the northern district of the ninth ward of the city of Albany was blocked on the afternoon of the day of election so that the republican voters had

great difficulty in getting up to the poll, and in some instances were unable to do so. Many witnesses have been examined to this point on both sides, and the evidence is, in some respects, contradictory.

That the poll was at no time of the day actually blocked is evident from the well-established fact that votes were received during the entire day, without intermission. The inspectors were constantly engaged in taking the votes, and there was no delay, except the little which was incident to disposing of challenges and searching the registry for the names of voters. About six hundred votes were taken during the day and this was an average of about a vote for every minute of time the poll was open.

That there was a great number of persons there pressing to get up to vote and that there was a great difficulty in getting up through the crowd to the poll there is no doubt; and it is equally certain that there was difficulty in getting out through the crowd after voting; with so great a pressure around the poll and with the excitement attendant upon such an election, it could hardly have been otherwise. But a fair examination of the testimony negatives entirely the idea that there was any predetermination to prevent a fair vote, or any concerted action at the poll to deprive republican voters of the same rights enjoyed by those who voted the democratic ticket. The adverse testimony on this point is fully met and rebutted by the positive testimony of those who could not have failed to know it if any such combination had existed. There was no riot and but little personal violence, less than usually occurs on such an occasion among so large an assemblage, and in so heated a canvass.

The undersigned regard the proposition made to set aside the election of that particular district, so as to deduct the majority there given for Hungerford, and thus elect Shook, as entirely unwarranted in law, and an arbitrary exercise of power never before attempted in a legislative body. As a precedent, it could not fail to

be exceedingly dangerous, and it would go far to weaken the confidence of the people in the justice of their representatives. It would be a disfranchisement of the electors of that district, because it would deprive them of the opportunity of voting at a new election.

If a case occurs of fraud or violence of such an extreme character as to warrant the setting aside of an election, the only fair course is to remit the whole matter again to the judgment of the people. To select out a particular district, and to set aside an election in that district alone, or rather arbitrarily to reject all the votes of that district, and thus elect a favorite candidate is a usurpation of power not delegated, and a defiance of the popular will. It would be an election by the Assembly and not by the people.

Protesting, therefore, against the legality and justice of the proposed action, the undersigned dissent from the conclusion of the majority of the committee, and recommend that a resolution be adopted declaring that Oliver M. Hungerford was duly elected a member of this house, and rightfully holds his seat here.

All of which is respectfully submitted.

JESSE F. BOOKSTAVAR,
WILLIAM D. VEEDER,

Committee.

Assembly Documents, 1865, volume 9, No. 186; Assembly Journal, 1865, page 1164.

REPORTS MADE SPECIAL ORDER.

IN ASSEMBLY, *April 11, 1865.*

Mr. Gleason called for the consideration previously reported by the committee on privileges and elections relative to the petition of Joseph Shook, praying that he may be awarded the seat now occupied by Hon. O. M. Hungerford. * * * * *

Mr. Wood moved to make the consideration of said resolutions a special order for to-morrow evening at 7½ o'clock.

Mr. Speaker put the question whether the House would agree to said motion, and it was determined in the affirmative, two-thirds of all the members present voting in favor thereof.

Assembly Journal, 1865, page 1243.

SEAT AWARDED TO JOSEPH SHOOK.

ASSEMBLY CHAMBER, *April 12, 1865.*

Mr. Angel called for the consideration of the resolutions reported by the committee on privileges and elections in relation to the contested seat now held by Hon. Oliver M. Hungerford, in the words following, to wit:

Resolved, That the election held in the western district of the ninth ward of the city of Albany, on the 8th day of November last, is hereby declared void, in consequence of the freedom thereof being interfered with by violence, to such an extent as to disfranchise a large proportion of the electors in said district.

Resolved, That Joseph Shook by the greatest number of legal votes cast, was duly elected a member of Assembly, from the second district of Albany county, on the 8th day of November last, and is entitled to the seat now occupied by the Hon. O. M. Hungerford.

Debate was had thereon, when Mr. Redington moved the previous question.

Mr. Speaker put the question "Shall the main question be now put," and it was determined in the affirmative.

Ayes, 49. Noes, 39.

Mr. Speaker put the question whether the House would agree to said resolution, and it was determined in the affirmative.

Ayes, 59. Noes, 39.

Assembly Journal, 1865, page 1272.

JOSEPH SHOOK SWORN IN.

ASSEMBLY CHAMBER, *April 13, 1865.*

Hon. Joseph Shook to whom was awarded the right to the seat occupied in the past by Hon. O. M. Hungerford, appeared in the Assembly Chamber was sworn by the Speaker, and took his seat as a member from the second district of the county of Albany.

Assembly Journal, 1865, page 1271.

Case of William Williams and James S. Lyon.

**FIRST DISTRICT, ERIE COUNTY — PETITION OF JAMES S. LYON
PRESENTED.**

ASSEMBLY CHAMBER, *January 3, 1866.*

Mr. Jewitt presented the petition of James S. Lyon, claimant for the seat held by Hon. William Williams, from first Assembly district of Erie county, which was read and referred to the committee on privileges and elections.

Assembly Journal, 1866, vol. 1, page 30.

REPORT OF COMMITTEE — AWARD SEAT TO WILLIAM WILLIAMS.

ASSEMBLY CHAMBER, *March 6, 1866.*

Mr. Pitts, from the committee on privileges and elections, to which was referred the petition of James S. Lyon, for the seat now held in this House by Hon. William Williams, made the following report:

**REPORT OF MESSRS. PITTS AND LEVINGER, FROM THE COMMITTEE
ON PRIVILEGES AND ELECTIONS, RELATIVE TO THE SEAT NOW
OCCUPIED BY WM. WILLIAMS, OF ERIE COUNTY.**

Committee on privileges and elections, to which was referred the memorial of James S. Lyon, Esq., claiming that he was duly elected member of Assembly from the first Assembly district of the county of Erie at the last general election, and entitled to the seat in this body held by the Hon. William Williams, respectfully report:

That the committee made an order that each of the parties herein should prepare and serve upon the opposite party a statement of his case, and the votes and facts upon which he relied in this proceeding, which statements will be found at pages 134 to 139 of the evidence. The committee proceeded with all reasonable dispatch to hear the evidence in this proceeding, but have been unable to report at an earlier day, by reason of being engaged in the hearing of another contested case.

In this case the inquiry requires the consideration of ballots cast or offered by legal voters, but not counted or allowed, or erroneously allowed by the canvassers.

Of ballots illegally cast, for the reason that the voter casting them had not at the time the legal right to vote, and which were improperly allowed; and

Of alleged irregularities upon the part of the inspectors holding the poll at the time of the election.

It was conceded by the parties hereto that the majority for the sitting member, as returned by the board of county canvassers, is ten (see page two of the evidence), and it also appears by the returns from the several election districts, that the vote in this Assembly district was 3,142 for William Williams and 3,132 for James S. Lyon.

There was one ballot cast in the first district of the fourth ward, which was not allowed, which by mistake was deposited in the ward box, and which was a ballot for the sitting member. The whole number of votes cast in that district for member of Assembly was three hundred and seven, and the number of ballots found in the Assembly box was three hundred and six; besides the inspector, James Gilbert, testified that he put an Assembly ticket into the ward box through mistake, and gave notice of the same at the time. (See testimony of James Gilbert, page 104.) There is no conflict of evidence as to this vote, or as to the fact that it was not allowed, and the sitting member is clearly entitled to the same. (See Laws of 1842.)

There is another Assembly ballot proved to have been found, which was for the sitting member, in the State box in the same district, but it cannot be allowed for the reason that by counting it, it would cause an excess of one Assembly ballot, and the law above cited is, that whenever a ballot is found in the wrong box, if by counting it with those in the proper box it does not produce an excess, it is to be allowed, and it must not be allowed if it does produce an excess of votes over the whole number cast.

There were three Assembly ballots cast for James S. Lyon for member of Assembly, in the third election district of the second ward, by George A. Mills, A. Norris and Thomas S. Deever, which ballots were improperly received and allowed for the reason that the said voters were not registered. (See evidence, pages 77, 78, 79-131 and 132.) The evidence is uncontradicted that these three men voted for the contestant, and it is conceded that they were not registered. The contestant claims that these men were legal voters, and their votes should be allowed because they voted at the last general election preceding the election of last year in said district, and their names are on the poll list of the preceding year; that it was the duty of the board of registry to have placed their names on the registry, and that they should not be deprived of their right to vote on account of the fault, neglect or mistake of the registry board.

The law under which the last general election was held was passed at the last session of the Legislature (see Session Laws of 1865, chapter 740), and this is the first time that any committee or tribunal has been called upon to pass upon any of its provisions. We do not consider the position taken by the contestant as tenable. The Assembly district in question is a portion of the city of Buffalo, an incorporated city of this State (see evidence, page two), and by the provisions of the act above referred to, in all such districts no persons shall be allowed to vote unless his name is on the register prepared in accordance with the said statute by the proper board. The provision of the statute which applies to these three voters is as follows: "It shall be the duty of the said inspectors carefully to preserve the said list for their use on election day, and to designate one of their number, or one of the clerks, at the opening of the polls, to check the name of every voter voting in such district whose name is on the register; and no vote shall be received at any annual election in this State, unless the name of the person offering to vote be on the said registry made and completed, as hereinbefore provided, preceding the election; and any person whose name is on the registry may be challenged, and the

same oaths shall be put as are now prescribed by law. This section shall be taken and held, by every judicial or other tribunal, as mandatory and not as directory. And any vote which shall be received by the said inspectors of election in contravention of this section shall be void, and shall be rejected from the count in any legislative or judicial scrutiny into any result of the election."

Last part, section six, of law above cited. This law is imperative, and it is necessary that every voter should be registered, and that in accordance with its provisions. It specially declares that the above provision shall be mandatory, and that all ballots received from voters not registered shall be deducted in any scrutiny in the result of the election. To allow these votes would be an entire disregard of the statute, and one which would be so gross as to excite just and severe criticism. This law at the last election, in the judgment of the undersigned, prevented thousands of illegal and fraudulent ballots from going into the ballot-boxes, and from influencing the result. Any statute which preserves the purity of the election, and prevents fraud and illegal voting, is a public blessing, and should be strictly adhered to by all good citizens, without respect of party. The ballot-box is the very foundation of our institutions, and the bulwark of our civil liberty, which should be protected by every proper safeguard.

No question was made by either of the learned counsel as to the constitutionality of the law of last winter, and we do not feel called upon to elaborate upon this question. We have no doubt as to its constitutionality, and that the Legislature have not only the power but it is their duty to so regulate the manner of voting as to secure to the people of this State this great right, and to prevent elections from being carried by either or any party by means of fraudulent and illegal ballots. These three votes must be deducted from those allowed to the contestant.

The contestant claims that the ballot cast by John W. Clark, in the first district of the fifth ward, for the sitting member, should be rejected on the ground that he was a non-resident of the dis-

trict. It appears from the evidence that this voter lives in said district and ward and keeps a grocery in the eighth ward; that he moves his family and a portion of his furniture to the store during cold weather, but with no intention of making that his home; that in this instance he had taken a part of his furniture to his store, and had taken his wife there, but simply to stay during the winter, and that he now has furniture in his house and considers that as his home, and intends to return in the spring. (See evidence of John W. Clark, pages 129 and 130.) The facts as to this vote are undisputed, and appear in the evidence as above stated.

A person never loses one residence until he acquires another, and a person leaving a fixed place of abode temporarily or for a particular purpose, either for business, pleasure or health, with the intent of returning to such place as soon as such purpose is accomplished, does not lose his residence. (See *Crawford v. Wilson*, 4th Barbour, 504; *Low v. Niven*, Judge Folger's Report, Senate Document No. 1, vol. 1st, 1865, page 52, and cases there cited.) This vote should not be deducted from the sitting member.

It is also claimed by the contestant that the vote cast by Thomas Phillips, in the first district of the third ward, for the sitting member, should be deducted. This voter is a single man who formerly lived in this district, enlisted into the army, and upon his return took up his residence in the town of Elma, where he now resides. (See evidence, pages 122, 123 and 124; see evidence, pages 65, 66-68, 69.) This voter stated to several persons that he resided in the town of Elma, and at the time he cast his ballot he was a resident of the town of Elma, and his vote should be deducted from those allowed for the sitting member. (See evidence and cases above cited.)

In the first election district of the second ward, by the returns, it appears there were two hundred and forty ballots cast for William Williams, and eighty-five ballots cast for James S. Lyon. It is an undisputed fact that the returns as made upon the night of the election, the ballots cast for William Williams were two hundred

and forty-seven; for James S. Lyon, ninety-one, and that seven votes were deducted from those of the sitting member and six from the contestant by the mere direction of the inspectors or clerks. (See evidence, pages 2, 3-7-82.)

It appears that in the morning they for the first time discovered that there was an excess of twelve votes, and that a man by the name of Ryan, who was not registered, voted, but for which candidate does not appear, and they therefore decided to deduct thirteen votes as above stated.

In this district Mr. Kelly found four double ballots, all for the sitting member, and he destroyed one single ballot, leaving seven single ballots, which were placed under a lamp. (See evidence of Kelly, page 6.) Mr. Wells found one double ballot and one triple, all for William Williams, making five votes in all, which were also placed under the lamp. (See evidence, pages 28, 29.) In this district there was considerable confusion and much irregularity during the day, and in canvassing the votes the statute was not complied with in all respects. After closing the polls, the first duty of the inspector was to ascertain the number of persons voting and the number of votes cast, to see how they compared. It appears that the clerk had kept the number of each voter marked opposite his name on the poll lists, and had checked a mark under the head of each ticket; that there were eight hundred and thirty-eight votes cast in this district in all, and that there are twelve voters whose names are not checked as voting for member of Assembly. (See evidence, pages 98, 99, 100.)

It is claimed by the contestant that these double ballots should have been destroyed, and that they were improperly counted for the sitting member.

The rule of law is that whenever any double ballots shall be found they shall be laid aside, and if, by allowing them when counted singly, it produces an excess of votes, they shall both be destroyed; for the fraud attempted to be perpetrated, the law punishes the voter by destroying the legal as well as the illegal vote. (See Laws of 1842, chap. 130, § 37.)

Six men in this case attempted to vote more than one ballot, and it producing an excess, the whole six must be disfranchised, as there was an excess of ballots even after destroying these votes. It appears from the poll lists that three hundred and twenty-five men voted for member of Assembly; it is also proved that two voters named O'Neil and Leary voted for the sitting member for member of Assembly, whose names are not so checked on the poll lists, which would increase the number of votes cast in this district to three hundred and twenty-seven. (See evidence, pages 115, 116, 117, 119 and 120.)

From the poll lists of this district introduced in evidence before the committee it appears that these men are not checked as voting for member of Assembly.

Were these six double ballots counted for the sitting member? After a careful review of all the evidence, it is the conclusion of the undersigned that they were. Kelly swears that they were placed under the lamp, and afterwards taken out and counted by George A. Moore. (See evidence, pages 7, 18 and 37.)

The evidence of Joseph McAbe, one of the inspectors, is very unsatisfactory upon this point; but a fair construction of his testimony leads to the conclusion that these ballots were counted. (See evidence of Joseph McAbe.)

If there had been three hundred and thirty-eight votes cast for member of Assembly, these six double ballots when opened and counted would have made three hundred and thirty-four ballots, but there were only three hundred and thirty-eight ballots in all; if three hundred and twenty-seven, the number proved, had only voted for member of Assembly, there should have been only three hundred and thirty-three ballots in all; but there were three hundred and thirty-eight, an excess of five. There is evidently a mistake somewhere, which will be considered hereafter in its bearing upon another question.

In the judgment of the undersigned, James S. Lyon should be allowed ninety-one ballots, the number proved to have been cast for him before any deduction was made, and William Williams should

be restored to the number first found for him, two hundred and forty-seven, from which deduct the six double ballots or twelve ballots (one having been destroyed by Kelly), which leaves him in this district two hundred and thirty-five votes. We only deduct twelve votes, as the inspector erroneously rejected Ryan's vote, which cannot be done, as it is not proved how he voted. By this process it will be seen that it shows an excess of five votes, if we find that three hundred and twenty-seven was the whole number of votes cast for member of Assembly, as after disfranchising six votes, which we have done, it should only leave three hundred and twenty-one as the whole number of votes.

If it were true that there was an excess of five votes, the inspectors should have placed the whole number of ballots back in the box and drawn out the excess, which was not done in this case. If we accept it as a fact that there was an excess of five ballots, would we be justified in vitiating the election for this failure on the part of the inspectors to perform their duty in drawing out the excess? We hold not. An election should not be set aside and a large number of voters disfranchised for every irregularity or failure to comply with a statute regulation. Those provisions of the election law which are directory apply to the inspector, and not to the tribunal reviewing this action. (See *Low v. Niven*, above cited, page 34.) There is no rule by which this committee can deduct or draw the excess of votes. We cannot tell which party would have lost or gained if the law had been followed; and we do not believe we should be justified by any law or principle in setting aside the election for this irregularity. And it is not clear that there was this excess. Conceding that there were six double ballots, which when counted made twelve ballots, and all counted together making three hundred and thirty-eight votes cast, there must have been three hundred and thirty-two ballots cast, six of which were double ballots, and when opened counted twelve, and would make just the number three hundred and thirty-eight, these twelve ballots, by the statute, must be destroyed, which would be equivalent to deducting six ballots from three hundred and thirty-two, leaving two hundred

and twenty-six ballots in all to be allowed; that is, six of these voters must be disfranchised, destroying the six illegal and the six legal votes found with them. It will be seen that by adding together ninety-one votes allowed for Lyon, and two hundred and thirty-five we allow for Williams, makes three hundred and twenty-six votes in all, just the number there should be if this theory is correct. It is proved that the inspectors and clerks conducted the election loosely, and that there were irregularities and mistakes, and two voters were found who voted and yet were not checked. With this state of facts proved to exist, we do not believe it would be a very violent presumption to presume that others voted who were not checked, up to the requisite number. In both views of this matter, and with all the evidence before us, we cannot decide to set this election aside for this irregularity.

There are other irregularities complained of by the contestants which we do not believe are sustained by the evidence; and, if they were, are of such a character and kind as cannot change the result. The opening or closing of the poll at the proper time is not such an irregularity as would vitiate this election. And the balance of the proof is, that they were opened and closed at the proper time.

As to the allegations of destroying ballots and putting ballots in the ballot-box by Inspector Joseph McAbe, we must hold that the allegation is not sustained by the evidence. Each of the inspectors, McAbe and Kelly, were indiscreet, and at times were excited; but all the evidence considered together shows that no such irregularity complained of took place. (See evidence of Kelly and McAbe.)

It must be remembered that the contestant holds the affirmative of this view, and must furnish the balance of proof.

It is claimed by the contestant that, in the third election district of the first ward, the votes of Frederick J. Frost and Patrick McAbe, legal voters, were improperly rejected, and that said ballots were for him. As to Mr. Frost it would seem from his evidence that he went to vote, but, not having a full set of ballots, retired to complete his set, and, that when he came back to vote, was told that he had voted; and they refused to receive his votes. (See evidence,

page 45.) Witness Woodward (see evidence, page 56), testifies to the same fact, and that he informed the inspector that his ballots had not been received. It appears that this voter was checked as voting. (See evidences, pages 61 and 112.) O'Donnell, the inspector in this district, contradicts the evidence of Mr. Frost, and testifies that his ballots were received. (See evidence, pages 107 and 108.) We believe, from all the evidence, that the inspector is mistaken, and that this man was not allowed to vote. He was a legal voter, and his ballots should have been received. We cannot allow this ballot for the contestant. The voter might have changed his mind, and had the right to change his mind before casting his ballot. It is only in cases when sufficient legal votes have been rejected through fraud, force or mistake, as would have clearly changed the result, that we should be justified in declaring that the sitting member was not entitled to his seat, and remitting the election to the people. We cannot count the ballot for the party for whom it might have been cast, but only in cases where, if it had been received, it would have changed the result can we send the election back to the people. (See *Low v. Niven*, *supra*, pages 37 and 38.)

Taking the evidence of Patrick McAbe, Inspector O'Donnell, and others present, we do not see how it can be claimed that his vote should be counted. It appears to us, conclusively, that he went in the morning to vote and was challenged; that he then left the poll, refusing or neglecting to take the requisite oath; that he went to the poll the second time and inquired if the inspector deposited his ballot, and when informed that he did not, went again the third time and offered to vote, and again refused to take the necessary oath; the last time McAbe was intoxicated. This voter failed to comply with the provisions of the law, and his whole conduct was such that the inspector was justified in rejecting his ballot. (See evidence, pages 49-108, 112, 113.)

From the above conclusions of the undersigned, we do find that William Williams was elected as member of Assembly from the first Assembly district of the county of Erie, by two majority over the contestant, James S. Lyon.

We have made a schedule of the votes, hereto attached, marked A. It appears that the sitting member has a clear majority, and we are therefore of the opinion that he is entitled to retain his seat in this body; and we would therefore recommend the adoption of the following resolution:

Resolved, That William Williams was duly elected member of Assembly for the first Assembly district of the county of Erie, at the general election held in November, 1865, by a majority of all the votes cast for member of Assembly in that district at said election, and that he is entitled to retain the seat in the Assembly now occupied by him.

ADOLPH LEVINGER.

EDMUND L. PITTS.

ALBANY, *March* 6, 1866.

SCHEDULE A.

Whole number of votes for Williams.....	3,142
Add seven ballots arbitrarily deducted in the second district, first ward.....	7
Add one vote found in ward box in first district, fourth ward, not allowed by inspectors.....	1
	<hr/>
	3,150
Deduct twelve ballots, being double, found in second district, first ward.....	12
Deduct one vote, Thos. Phillips, non-resident.....	1
	<hr/>
	13
	<hr/>
Leaving whole number of votes cast.....	3,137
Whole number of votes for Lyon.....	3,132
Add six votes erroneously deducted by inspectors, second district, first ward.....	6
	<hr/>
	3,138
Deduct three votes, not registered, of Miller, Norris and Deeves.....	3
	<hr/>
	3,135
	<hr/>
Leaving majority for William Williams.....	2
	<hr/>

(For proceedings, testimony, petitions and notice of contestant, reply of sitting member, see Assembly Documents, 1866, vol. 2, No. 31.)

Assembly Documents, 1866, vol. 6, No. 128, which report was laid on the table and ordered printed.

REPORT OF MINORITY OF COMMITTEE.

Mr. Veeder, from a minority of the committee on privileges and elections, reported in writing, dissenting from some of the positions taken by the committee, but uniting in the concluding resolution, as follows:

REPORT OF MESSRS. VEEDER AND POST FROM THE COMMITTEE ON PRIVILEGES AND ELECTIONS, RELATIVE TO THE SEAT NOW OCCUPIED BY WILLIAM WILLIAMS, OF ERIE.

The undersigned, members of the committee on privileges and elections, to whom was referred the memorial of James S. Lyon, claiming the seat of Hon. William Williams to this House, as a member of Assembly from the first Assembly district of the county of Erie, respectfully report.

That while they cannot agree with some of the conclusions found by other members of said committee, and particularly as to the constitutionality of the law of last winter, known as the registry law, yet they are of the opinion, from the facts as proven by the respective parties, that the Hon. William Williams received the greater number of votes cast for member of Assembly, for the first Assembly district of the county of Erie, at the last general election, and was therefore duly elected to said office, and therefore we recommend the adoption of the following resolution:

Resolved, That William Williams was duly elected a member of Assembly from the first Assembly district of the county of Erie, at the last general election, by a majority of all the votes cast for mem-

ber of Assembly in said district, at said general election, and that he is therefore entitled to retain the seat in the Assembly now held by him.

WM. D. VEEDER.
LEWIS POST.

ALBANY, *March 6, 1866.*

Assembly Documents, 1866. vol. 6, No. 127.

REPORTS MADE SPECIAL ORDER.

Mr. Pitts moved that said reports and resolutions be made the special order for Wednesday, March 4, at half-past seven o'clock, and that a session be held at that time for that purpose.

Mr. Speaker put the question whether the House would agree to said motion, and it was determined in the affirmative, two-thirds of all the members present voting in favor thereof.

Assembly Journal, 1866, vol. 1, pages 610, 611.

SPECIAL ORDER RECONSIDERED.

ASSEMBLY CHAMBER, *March 8, 1866.*

Mr. Pitts moved to reconsider the vote making the reports and resolution of the committee on privileges and elections, in the matter of James S. Lyon against Hon. William Williams for the seat now occupied by the said Williams, the special order for Wednesday evening, March 14.

Mr. Speaker put the question whether the House would agree to said motion, and it was determined in the affirmative, two-thirds of all the members present voting in favor thereof.

WILLIAM WILLIAMS AWARDED THE SEAT — REPORTS ADOPTED.

Mr. Pitts moved the adoption of said reports and resolution offered by him awarding the seat to the present occupant, William Williams.

Mr. Speaker put the question whether the House would agree to said motion, and it was determined in the affirmative.

Assembly Journal, 1866, vol. 1, page 651.

Case of James F. Crawford and Joseph M. Murphy.

FOURTH DISTRICT, ALBANY COUNTY — PETITION OF JOSEPH M. MURPHY, PRESENTED.

ASSEMBLY CHAMBER, *January 4, 1866.*

Mr. Cochran presented the petition of Joseph M. Murphy, of the county of Albany, claiming the seat now held by Hon. James F. Crawford, which was read and referred to the committee on privileges and elections.

Assembly Journal, 1866, vol. 1, page 35.

REPORT OF COMMITTEE IN FAVOR OF AWARDING SEAT TO JOSEPH M. MURPHY.

ASSEMBLY CHAMBER, *March 21, 1866.*

Mr. Pitts, from the committee on privileges and elections, to which was referred the petition of Joseph M. Murphy, that he may be awarded the seat now occupied by Hon. James F. Crawford, reported in writing adversely thereto, as follows:

MAJORITY REPORT OF THE COMMITTEE ON PRIVILEGES AND ELECTIONS IN RELATION TO THE CONTESTED SEAT OF THE FOURTH ASSEMBLY DISTRICT OF THE COUNTY OF ALBANY.

The undersigned members of the committee of privileges and elections to which was referred the memorial of Joseph M. Murphy of the city Albany, claiming that he was at the last general election held November 7th, 1865, duly elected a member of Assembly from the fourth Assembly district in the county of Albany, and that he is rightfully entitled to the seat therein, now possessed by James F. Crawford, do respectfully report:

That on the twelfth day of January, 1866, the committee met pursuant to the call of the chairman, at the Capitol in the city of Albany, and a resolution was passed that the contestant serve upon the sitting member, within five days, a statement of the grounds upon which he claims the seat of the sitting member, and the

names of voters whose votes were claimed to be illegally cast, and that the sitting member serve a similar statement upon the contestant on or before the thirtieth of January, 1866, which resolution was complied with by the respective parties, and the said statements will be found at pages 2, 3, 4, 5 and 6 of the evidence.

The whole number of votes cast in this Assembly district at the last general election for member of Assembly was four thousand six hundred and ninety-two, of which James F. Crawford, by the return of the county canvasser, received two thousand three hundred and forty, and Joseph M. Murphy two thousand three hundred and thirty-nine (see evidence page 6). The first allegation in the contestant's statement is to the effect that in the eighth election district, of the town of Watervliet, three electors duly qualified to vote in said district did vote for member of Assembly, but their names were not entered on the poll lists kept at said election as voting for member of Assembly. Two of these ballots were for the contestant and one for the sitting member. The number of ballots exceeded the number of names on the poll list checked as voting for member of Assembly; three votes and three ballots were drawn out of the whole number and destroyed, one of which was for Crawford and two for Murphy. (See statement allegation first and evidence pages 7, 8 and 9.) This allegation was substantially proved, and upon the agreement it was conceded by the counsel for the sitting member that two votes should be restored to the contestant and one to the sitting member. There being no dispute as to the above facts, no time need be taken in a discussion of the facts or law involved, and the votes will be restored to the respective parties as above indicated.

The second allegation in the contestant's statement will be considered hereafter in connection with the first allegation of the statement made by the sitting member, as they both involve the same and an important principle of law, and a construction of the registry law of last year.

The contestant in this third allegation claims that he was deprived of one vote in the western election district of the seventh ward of the city of Albany, which ballot was placed by mistake in the judiciary box.

A ballot found in a box different from that designated by its indorsement shall be counted if there shall not, by so doing, be produced an excess of votes over the number of voters as designated by the poll lists. (Laws of 1842, chap. 130, page 109, sec. 38, title 4.)

The foregoing is that portion of the statute applicable to cases of this kind, and the decision of this vote in question demands an examination of the evidence.

Three witnesses testify that a ballot was found in the judiciary box for Joseph M. Murphy, for member of Assembly, viz.: James Ward, one of the inspectors, pages 20 and 21 of the evidence, Tunis Visscher, evidence, pages 21 and 22, William Gibson, poll-clerk, evidence, pages 26 and 27; and that this ballot, through mistake or otherwise, was not allowed and returned. These three witnesses swear positively to this fact, and there is no contradiction in their evidence upon this point. Two witnesses, James Mulcahy, one of the inspectors, evidence page 44, and William Murphy, the other inspector, both testify that the vote in question was found in the judiciary box, but that it was counted and allowed for the contestant. These witnesses all agree that in this district the number of ballots cast fell short of the number of electors checked as voting on the poll lists two votes; that one ballot was found in the constitutional amendment box for Crawford, which was allowed, and the one found in the judiciary box for Murphy would make the number of ballots agree with the number of voters checked as voting, and it should have been allowed. From all the evidence, we are of the opinion that this ballot for the contestant was not allowed or returned, through the mistake or oversight of the inspectors, and it must accordingly be added to the vote of the contestant, making his vote in this district two hundred and ninety.

The vote of William Parker, claimed by the contestant in the fourth allegation of his statement, it was conceded upon the argument by his able counsel, should not be allowed. As a matter of fact, we must hold that this voter did not offer his ballot until after the closing of the polls, which were closed at the regular and proper time, and it could not therefore be allowed to the contestant in this examination. (See evidence, pages 23, 24, 44 and 50.)

The board of county canvassers allowed for the sitting member one ballot, returned as having been cast for J. F. Crawford, and two returned as having been cast for James C. Crawford, which it is claimed in the fifth and last allegation of contestant's statement was improperly allowed. There were union ballots with the name of Joseph M. Murphy erased, and the name of the sitting member written thereon; one of the ballots had the name James written at the left of Joseph M. Murphy, which was erased, and at the right, C. Crawford, and underneath the erasure the name James C. Crawford again written. (See evidence, page 68.)

The counsel for the contestant conceded that the first two votes above named should be allowed, but that the last one with the name James C. Crawford written thereon twice should be rejected for the reason that by statute each ballot must contain the name of but one person for the same office.

The intention of the voter should be ascertained, if possible, and technicalities, and unimportant mistakes should not be allowed to deprive him of his ballot. It is proved that the sitting member has lived in this election district for many years, has an extensive acquaintance, and no proof is made that any other person of the same name lives in the district. We consider the law as settled that ballots cast as these were, and under all the circumstances, are to be allowed, and we understand the counsel for the contestant to hold this same view of the law. (*People v. Cook*, 8th New York, 67; *Low v. Niven*, *Folger's Report*, pages 16 and 17.)

As to the ballot with the name of the sitting member written thereon twice, we do not see how it can be successfully maintained

that this ballot is void as containing the name of two persons for the same office. It is the same name, and the name of the same person written thereon, and by no possibility can be deemed as the name of two different or distinct persons.

In the case of *The People v. Saxton*, 22 N. Y. Reports, page 311, the Court of Appeals held that a ballot cast for Silas Saxton for county treasurer, should be allowed, when the name of his opponent had not been erased, and the ballot read as follows: *Silas Solomon S. Hommell Saxton*, Silas being written before and Saxton after the printed words, Solomon S. Hommell. How was the name of two persons upon one ballot for the same office? Still the court held that it should be allowed to Silas Saxton, as it was apparent that it was intended for him. In the case of *Low v. Niven*, above cited, one ballot was found with the names, for Senator, Low, Low which ballot was allowed, and we would call attention to the very able argument upon this subject in that standard authority. Henry J. Vanderwerken testifies that he cast the ballot containing the name of the sitting member written thereon twice; that he was acquainted with Crawford, and it was his desire and intention to vote for him. (See evidence, page 68.) This witness wrote the name of James C. Crawford in the presence of the committee, and we could not discover any difference between the handwriting on the ballot in question and the name written by him. The intention of the voter is clearly shown; we cannot hold that writing the name of the same person twice on a ticket is a violation of the statute requiring the name of but one person to be written or printed on the ballot, and both from principle and construction of the statute by the courts, we believe this ballot must be allowed the sitting member, and accordingly hold that it shall not be deducted from the vote returned for him.

This brings us to a consideration of the votes of Le Qui and Thomas Jackson, both residents of the eighth election district of the town of Watervliet. Le Qui offered to vote; it was decided by a majority of the inspectors that his vote could not be received

for the reason that he was not registered, and one of the inspectors received his ballots, placed them in his pocket, and they were introduced in evidence before the committee. Jackson's ballots were received by the inspectors, and although his name was not registered his ballots were deposited in the ballot-boxes, and his name placed on the registry on the day of election. This ballot was cast and allowed for the contestant. It appeared that the board of registry in this district adopted a rule, that any person desiring to be registered who had formerly lived in another district, should bring a certificate from the registry board of that district, certifying that his name had been taken from their registry list. Le Qui did not bring this certificate until election day, and his ballots were rejected as above stated. Jackson did bring his certificate to the board at their last meeting, and through some mistake or oversight his name was not registered, and the inspectors decided to receive his ballot, and register his name on election day, on the ground that he had complied with their order. These facts are undisputed. There is no doubt that both these persons were electors, entitled to vote at the last general election in said district, provided they were duly and properly registered. The registry board had no right to make and enforce the rule they did; it was sufficient when a man complied with the law, and they transcended their power by imposing any additional condition; for this there is no doubt of their personal liability to the party aggrieved. The simple question is, whether, when an elector has complied with the statute so far as he is concerned, and entitled to be registered, and through mistake, neglect or intention his name is not registered, he is entitled to vote. This requires an examination of the law of 1865. The law of last year, after providing for the appointment of registry boards, times of meeting, etc., contains the following provision:

"It shall be the duty of the said inspectors carefully to preserve the said list for their use on election day, and to designate one of their number or one of the clerks at the opening of the polls to check the name of every voter, voting in such district, whose name

is on the registry and no vote shall be received at any annual election in this State, unless the name of the person offering to vote be on said registry, made and completed as hereinbefore provided, preceding the election; and any person whose name is on the registry, may be challenged, and the same oaths shall be put as are now prescribed by law. This section shall be taken and held by every judicial or tribunal as mandatory, and not as directory. And any vote which shall be received by the said inspectors of election in contravention of this section shall be void, and shall be rejected from the count in any legislative or judicial scrutiny into any result of the election."

While a legislative committee have greater power in some respects in cases like this than a judicial tribunal, still we are to be governed by rules of evidence, the law of the land, and the well settled principle of construction which the wisdom of ages has produced.

The position of the contestant is, that under the law itself, when a person who is legally entitled to vote, has done all in his power to be registered, that it is no violation of the statute to receive his vote; and he claims to make a distinction in a case like the one of Jackson, and when an elector who voted the year before does not attend the board to be registered. It seems to us that there can be no mistake in the language of the above statute; it is full, strong and explicit; it declares in positive terms that no vote shall be received unless registered, and if any such vote shall be received in any scrutiny into the result by any tribunal or legislative committee, the same *shall* be deducted; and also declares that its provisions shall be construed as mandatory and not directory. No one can mistake the meaning of this language, and how much we may differ as to the constitutionality of the law, there can be no difference of opinion as to its meaning.

It is the duty of courts in construing statutes to give effect to the intent of the law-making power, and to seek for that intent in every legitimate way; yet it is to be sought first of all in the words

and language employed; and if the words are free from ambiguity, and express clearly the sense of the framer, there is no occasion to resort to other means of interpretation. The office of interpretation is to bring a sense out of the words, not a sense into them. When the language is plain, the Legislature must be understood to mean what they have clearly expressed, and there is no room for contradiction. We have no right to resort to forced or subtle construction for the purpose of either limiting or extending the effect of a statute. Courts cannot correct what they may deem excuses or omissions in legislation, nor relieve against the occasionally harsh operations of a salutary provision, without the danger of doing vastly more mischief than good. (See *McCluskey v. Cromwell*, 11 N. Y. 593; *Newell v. People*, 7 N. Y., 97; *Smith's Statutory and Constitutional Construction*, section 650; *Whalen v. Harris*, 20 Wendell, 555, 562.)

It is also our duty to so construe a statute as to meet the mischief and advance the remedy, and not violate fundamental principles. (*Hall v. Cline*, 8 Johnson, 41.)

The statute under consideration was enacted to remedy an evil in the previous law, by which persons not registered were permitted to vote. The old law was held directory, and it was the intention of the Legislature to compel electors to be registered; and in order to prevent persons from voting who had not complied with its provisions, it was declared to be peremptory. We do not see how human language could have made it any stronger. There is no difference in principle between the right of Jackson to vote, and an elector who had voted the previous year, whose name was on the poll lists of the previous year, and who by the law had a right to believe that his name would be registered, as it is the duty of the board to register all names of persons on the poll lists of the previous year, and it is a presumption of law that all public officers do their duty. (*Hartwell v. Ross*, 19 Johnson, 345.)

If we are to give any effect to the registry law of 1865, the vote of Jackson must be registered. There is no doubt that this construction

may, in some individual cases, prevent an elector from voting; but when the public good is in question, we have no right to fritter away salutary provisions to relieve individual cases." "It is hard cases which make bad law." To give the effect to the statute claimed by the contestant, would be virtually deciding that the law in question is unconstitutional — a length we are not prepared to go.

By the Constitution, every male citizen of the age of twenty-one years, who shall have been a resident of his district for the length of time prescribed, shall be entitled to vote for all officers to be elected. By section two, article two of the Constitution, the Legislature is empowered to pass laws excluding from the right of suffrage all persons who have been or may be convicted of bribery, larceny, or of any infamous crime; and for depriving every person who shall make or become directly interested in any bet or wager depending upon the result of any election, from the right to vote at such election.

By section four, the Legislature is empowered to enact laws for ascertaining by proper proof the citizens who shall be entitled to the right of suffrage hereby established. The Legislature have always exercised the right to pass laws for the purpose of preventing illegal and fraudulent voters from voting and thus influencing the result. Both of these sections are to be construed together and under the last provisions we do not see how it can be successfully maintained that the present law is constitutional. Laws have been passed providing that in certain cases the elector should not be permitted to vote unless he should comply with certain regulations and conditions and take an oath prescribed by the statute. Would it be contended, that because some person with conscientious scruples against taking an oath should be repelled from the polls and prevented from voting, that the law would be void because it should so operate as to deprive such a person of the right to vote? We can discover no difference in principle between the compelling of electors to take oaths in certain cases, on any of the provisions

previously passed, and the law in question, as far as the constitutional right to enact the law is concerned. The Legislature have not only the power but it is their duty to pass all necessary laws to preserve and protect the ballot-box. It is no reason that the law is invalid because in some instances electors shall be deprived of their right to vote by reason of any act or negligence of theirs or on account of the failure on the part of the officer to whom the execution of the same is intrusted to perform his duty. The object of the registry law is to ascertain by proper proofs, the persons entitled to exercise the right of suffrage, and because the same is stringent in its provisions, so long as only proper proofs are required, the objection made that in some cases persons entitled to vote may be deprived of their right on account of a failure to comply with its provisions, certainly cannot be successfully maintained, and would apply to all previous legislation upon this subject. We believe it is universally conceded that the compelling of electors to take oaths in certain cases comes within the letter and meaning of the Constitution, and as we have endeavored to show, the statute in question is the same in principle as previous legislation. The committee have already passed upon a similar question in the case of James S. Lyon against William Williams, by which we refused to allow the ballots of voters not registered, and the said report was sustained by the House.

There is no difference in principle between these votes and those rejected in the above case. In the case above referred to, three voters, who had voted the previous year and whose names were on the poll lists of the previous year, were not registered. By the statute in question, it was the duty of the board to register these voters, and they were not obliged to attend the board to be registered, but had the right to rely and trust in the faithful performance of their duty upon the part of the registers, in case above cited, and it can make no possible difference whether they attended the board as in the previous case or whether they relied upon their names being registered in pursuance of the statute in neither of these cases is it shown that the registry board acted fraudulently or

in bad faith. It is evident that they both were mistaken in the law, and in the one case failed or omitted to register legal voters, and in the other demanded additional conditions to be complied with not provided by the statute; but these conditions were general, and cannot possibly be construed as fraudulent.

The vote of Jackson must be deducted from those of the contestant, and the vote of Le Qui cannot be allowed.

The sitting member charges in his second allegation that Timothy Stanford voted for Joseph M. Murphy, and that he was not a legal voter on account of having been convicted and sentenced to the State prison for the crime of grand larceny.

Stanford testified that he voted for the contestant in the third election district of Watervliet; that he took a democratic ticket, erased the name of Crawford and wrote thereon the name of the contestant, and voted it. (See evidence, pages 65 and 66.)

The inspector for this district testifies that the name of Timothy Stanford is on the poll-lists as having voted for member of Assembly, and also that a democratic ticket was found with the name of contestant written thereon, as sworn to by said Stanford. This witness being uncontradicted and corroborated in these two points, we hold that we should not be justified to reject his evidence. (See evidence, page 68.).

This man Stanford was not at the time a legal voter, he having previously been convicted of a felony and sentenced to the State prison, and by the law of this State he would not be permitted to vote unless restored to his civil rights by a pardon of the Governor. (See evidence, page 67.)

Stanford was pardoned by the Governor, February 6, 1866, which restored his competency as a witness. (See evidence, page 79.)

This vote must be deducted from those allowed the contestant.

There was proof given by the sitting member relative to ballots not received by the inspectors, and claimed by him to have been improperly rejected, which we are not required to examine, as it cannot possibly affect the result, and we do not pretend to pass upon the question of fact, whether they are offered by the voters in question

and improperly rejected. Granting that they were, we could not allow them to the sitting member; the most we could do in such cases would be to set the election aside, in case a sufficient number of legal ballots had been improperly rejected to change the result. It will be seen from the evidence that the committee refused to receive proof on the part of the contestant relative to a ballot found in the State box, in the fifth district of Watervliet, for Joseph M. Murphy, which should have been allowed. This evidence was rejected upon the ground that it was outside of the specifications. It was understood by all parties that they were to be held strictly to their specifications, and no injustice has been done the contestant by this ruling. The sitting member would have gone into proof as to other of his allegations, in case it had been necessary, or in case additional evidence had been adduced by the contestant.

The undersigned believe that it is far better for the rights of all, and the good of the people of this State, that the law should be maintained, even if in some cases it may work a hardship, and that there would be far more damage to set law at naught because it might occasionally prevent an elector from voting. No human law can be perfectly executed or work exact justice, and we can only endeavor to approximate as near to a perfect standard as possible.

From the above findings it is apparent that the sitting member, James T. Crawford, was duly elected member of Assembly from the fourth Assembly district of the county of Albany, at the last general election, by a majority of one, as will appear by the schedule hereto attached, marked A, and we do therefore recommend the adoption of the following resolution:

Resolved, That Hon. James F. Crawford was duly elected member of Assembly from the fourth Assembly district of the county of Albany, at the general election held in November, 1865, by a majority of all the legal votes cast therefor in said district, and that he is entitled to retain the seat in the Assembly now occupied by him.

EDMUND L. PITTS.

P. J. DOWNING.

LEWIS POST.

ALBANY, *March 20, 1866.*

I concur in the foregoing report excepting so much thereof as passes upon the question of the constitutionality of the registry law of last year.

In regard to that act, I cannot agree that the provisions thereof are within the spirit and intent of the Constitution. I, however, concede that until the law shall be declared by some competent judicial tribunal to be unconstitutional, we are bound by its provisions.

WM. D. VEEDER.

ALBANY, *March 21*, 1866.

SCHEDULE (A) REFERRED TO.

Whole number of votes cast for James F. Crawford.....	2,340
Add one vote improperly drawn out in eighth election district, Watervliet	1
	<hr/>
Crawford's vote	2,341
Whole number of votes cast for Joseph M. Murphy,	2,339
Add two votes improperly drawn in eighth election district, Watervliet	2
Add one vote found in judiciary box in western district of seventh ward.....	1
	<hr/>
	2,342
Deduct one vote of Thomas Jackson not registered.	1
Deduct one vote of Stanford, a convicted felon... .	1
	<hr/>
	2
Murphy's vote.	2,340
	<hr/>
Leaving majority for Crawford.....	1
	<hr/> <hr/>

Assembly Documents, vol. 7, 1866, No. 164. See Assembly Documents, 1866, vol. 4, No. 66, for memorial, reply, evidence, etc., etc.

REPORT OF MINORITY OF COMMITTEE IN FAVOR OF AWARDING
SEAT TO JOSEPH M. MURPHY.

ASSEMBLY CHAMBER, *March 21, 1866.*

Mr. Levinger from the committee on privileges and elections, to which was referred the petition of Joseph M. Murphy, that he may be awarded the seat now occupied by Hon. James F. Crawford, reported in writing, dissenting from the views of the majority, as follows:

IN ASSEMBLY, *March 21, 1866.*

MINORITY REPORT OF THE COMMITTEE ON PRIVILEGES AND ELECTIONS, IN RELATION TO THE CONTESTED SEAT OF THE FOURTH
ASSEMBLY DISTRICT OF THE COUNTY OF ALBANY.

The undersigned, one of the committee on privileges and elections of your honorable body, to which was referred the petition of Joseph M. Murphy, claiming that he was, at the general election held on the 7th day of November, 1865, duly elected a member of your honorable body, from the fourth Assembly district, in the county of Albany, and that he is entitled to the seat therein now possessed by James F. Crawford, does respectfully report:

That he dissents from so much of the majority report made in this matter, as refers to the votes cast by Lewis Le Qui, in the eighth election district of the town of Watervliet, and by Thomas Jackson, cast in the same district.

The subscriber is of the opinion that the vote cast by said Lewis Le Qui, at said election, and which was not canvassed, should have been counted, and should now be allowed in favor of Joseph M. Murphy, and that the vote cast by Thomas Jackson was properly allowed and counted for said Murphy, and should not now be deducted from his vote.

In coming to this conclusion, the subscriber is well aware that in the case of *Lyon v. Williams* (just decided by the committee on privileges and elections, of which the subscriber is a member), the committee disallowed to James S. Lyon three votes cast by legal

voters, whose names were not on the register of electors of the district in which they voted. The subscriber cannot now perceive how that committee could have arrived at any other conclusion. In that case it was clearly proven that the three voters (Norris, Deeves and Peck) had neglected to have their names placed upon the registry list, at any rate, that they had not exercised the proper care and vigilance to see whether their names were properly on said list; and there was nothing before that committee to decide upon, than the simple construction of the sixth section of the registry law of 1865, and that section declared in plain and unmistakable terms, that no vote shall be received at any annual election in this State, unless the name of the person offering to vote be on the registry, made and completed according to said law; the subscriber does not see how it could have been claimed that those three votes should have been counted in favor of the contestant in that case. There was no charge in that case nor any attempt to prove that the inspectors had intentionally violated their duty.

In this case the facts are quite different. Both Jackson and Le Qui, both of whom are conceded to be legal voters, entitled to be registered, went before the board of registry and requested to have their names placed on the register. The inspectors, in violation of their plain duty, instead of placing the names of said voters on the register, compelled them to go and obtain a certificate from the inspectors of the district where they had resided and had voted the year previous, before they would place their names on the register. Moreover, in the case of Jackson, it was proved that he actually brought back to the inspectors the required certificate the day before election, and yet, when he came the next day to vote, his name was not found on the registry.

And the question to me, in view of these facts, which are undisputed, is not as presented by the majority report, "What is the proper construction of the sixth section of the law of 1865?" But it is this: When a voter has done all the law requires him to do, for the purpose of having his name placed on the register (aye,

In the case of Le Qui, the ballot cast by him was received and registered by one of the inspectors, and by him brought before the committee; and in the case of Jackson it was actually received and canvassed by the inspectors, and as a new election would only tend to ascertain the will of the electors, and as we have the evidences of that will before us, such election is unnecessary.

As both of those electors are proved beyond any doubt to have voted for Joseph M. Murphy, the subscriber has come to the conclusion to allow both votes to and to count them in favor of Joseph M. Murphy. And as in all other matters he agrees with the majority of the committee, as expressed in their report, he simply adds those votes to the aggregate vote of said Murphy, found in said majority report.

Making the number (instead of 2,341)	2,343
Crawford's vote by said report	2,342

And therefore find a majority in favor of Murphy of. .	<u>1</u>
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The undersigned, therefore, recommends the adoption of the following resolution:

Resolved, That Joseph M. Murphy has been duly elected a member of this body as member of Assembly from the fourth Assembly district of the county of Albany; that he is entitled to the seat therein now possessed by James F. Crawford, and that the said Joseph M. Murphy be placed in possession thereof.

All of which is respectfully submitted.

ADOLPH LEVINGER.

Dated *March* 15, 1866.

Assembly Documents, 1866, vol. 7, No. 167, pages 1, 2, 3 and 4.

See Documents, 1866, vol. 4, No. 66.

Mr. Levinger moved that said reports be made a special order for Wednesday, March 28th, at 12 o'clock, noon.

Mr. Speaker put the question whether the House would agree to said motion, and it was determined in the negative, two-thirds of all the members present not voting in favor thereof.

Mr. Speaker then put the question on the adoption of the majority report, and it was determined in the negative.

Ayes, 14. Noes, 82.

REPORT OF MAJORITY ADOPTED — SEAT AWARDED TO JAMES F. CRAWFORD.

Mr. Speaker then put the question on the adoption of the majority report, and it was determined in the affirmative.

Assembly Journal 1866, vol. 1, pages 873, 874.

Case of Smith M. Weed and Andrew Williams.

CLINTON COUNTY—PETITION OF ANDREW WILLIAMS PRESENTED.

ASSEMBLY CHAMBER, *January 3*, 1866.

Mr. Richardson presented the petition of Andrew Williams for the seat in the Assembly occupied by Hon. Smith M. Weed, which was read and referred to the committee on privileges and elections.

Assembly Journal, 1866, vol. 1, page 30.

REPORT OF COMMITTEE AWARDED SEAT TO SMITH M. WEED.

ASSEMBLY CHAMBER, *March 3*, 1866.

Mr. Pitts from the committee on privileges and elections, to which was referred the petition of Hon. Andrew Williams, that he may be awarded the seat now occupied by Hon. Smith M. Weed, reported in writing, as follows:

REPORT OF COMMITTEE.

The committee on privileges and elections to which was referred the petition of Andrew Williams, Esq., claiming the seat in the Assembly held and now occupied by Smith M. Weed, as member of Assembly for the county of Clinton, which petition is hereto attached, report:

That on the 11th day of January, 1866, the committee met at the Capitol in the city of Albany; that the said contestant appeared in person, and the sitting member in person, and with counsel R. W. Peckham, Jr.; that at said time it was stated by each of the parties herein, that there would be a large number of witnesses to be sworn as to the illegal votes cast at the last general election held in the county of Clinton; and that it would take a number of days to take the evidence, that the said committee held another meeting in said city of Albany, on the 12th day of January, 1866, which was attended by said parties; that at said time an order was made that the contestant should on or before the 16th day of January, 1866, prepare and serve a statement of the votes claimed by him, to be illegal and which he proposed to attach, and any and all irregularities relied upon by him in his claim to the seat of the sitting member; that afterward the time to prepare and serve said statement was extended at the request of both parties hereto; that the said Andrew Williams had failed to comply with said order, and had not prepared to contest said seat save as above stated; that a few days since he appeared at Albany and informed your committee that he proposed to claim the seat upon the return and proceedings of the board of county canvassers, and when informed that the sitting member would be allowed to go into proof and take evidence as to illegal votes cast for the contestant for member of Assembly for the county of Clinton, at the last general election, and that it was a legal right belonging to him, declined to contest the said election, and informed your committee that he should not pursue the case further; alleging among other things that it would be impossible to take the evidence before the close of the session, there being so many witnesses.

The sitting member, Hon. Smith M. Weed, having received the certificate of election from the board of county canvassers of the county of Clinton, that he was duly elected to the office of member of Assembly from said county, at the late general election, by the greatest number of legal votes, is entitled to his seat until legal evi-

dence is produced that he was not duly elected, and every presumption of law is in favor of the validity of his election.

In view of the above facts, the committee would respectfully suggest the adoption of the following resolution:

Resolved, That the committee on privileges and elections be discharged from the further consideration of the said petition of Andrew Williams, and that Hon. Smith M. Weed is entitled to his seat as a member of this House.

EDMUND L. PITTS.

A. LEVINGER.

O. J. DOWNING.

WM. D. VEEDER.

LEWIS POST.

March 3, 1866.

Assembly Document, 1866, No. 116.

REPORT ADOPTED.

Mr. Speaker put the question, whether the House would agree to said resolution, and it was determined in the affirmative.

Assembly Journal, 1866, vol. 1, pages 566, 567.

Case of Henry M. Dixon and Ira Buckman, Jr.

SEVENTH DISTRICT, KINGS COUNTY — PETITION PRESENTED.

ASSEMBLY CHAMBER, *January 1, 1867.*

Mr. Oakey presented the petition of Ira Buckman, Jr., for the seat of the Hon. Henry M. Dixon, from the seventh Assembly district of the county of Kings, which was read and referred to the committee on privileges and elections.

Assembly Journal, 1867, page 10.

REPORT PRESENTED.

IN ASSEMBLY, *April 20, 1867.*

Mr. W. S. Clark presented the report of the committee on privileges and elections, in the case of Henry M. Dixon, contested by Ira Buckman, which was laid on the table and ordered printed.

REPORT OF THE COMMITTEE ON PRIVILEGES AND ELECTION, IN
THE CASE OF THE SEAT FOR THE SEVENTH DISTRICT OF KINGS
COUNTY.

*To the Honorable the House of Assembly of the State of New
York:*

The undersigned, your committee on privileges and elections, respectfully report that on the fifth day of January, 1867, your committee met to hear the allegations and consider the petition of Ira Buckman, contestant of the seat of Hon. Henry M. Dixon, member from the seventh Assembly district of Kings county, when it appeared that the claim of the said Ira Buckman was founded solely upon the allegation in the petition of said contestant, that the Hon. Henry M. Dixon, member from the seventh Assembly district of Kings county, was not a citizen of the United States. At an adjourned meeting of your committee, held at Stanwix Hall, in the city of Albany, the parties being both present, the said Henry M. Dixon, member from the seventh Assembly district of Kings county, established his citizenship by producing before your committee the original certificate of his full naturalization and admission as a citizen of the United States, whereupon the said Ira Buckman, contestant, abandoned his claim to a seat in this House from the seventh district of Kings county; where fore your committee recommend the adoption of the following resolution:

Resolved, That the seat in this House for the seventh Assembly district of Kings county be, and hereby is awarded to Hon. Henry M. Dixon, and that the prayer of the petitioner be denied.

WM. S. CLARK.

L. H. HISCOCK.

A. HOFFMAN.

W. R. CHAMBERLAIN.

THOS. J. CREAMER.

Dated ALBANY, April 18, 1867.

Assembly Documents, 1867, volume 10, No. 234; Assembly Journal, 1867, page 1820.

Case of Frank A. Ransom and Edward Mitchell.**SEVENTH DISTRICT, NEW YORK CITY — PETITION PRESENTED.****ASSEMBLY CHAMBER, *January 3, 1867.***

Mr. Gridley presented the petition of Edward Mitchell, claiming the seat occupied by Mr. Frank A. Ransom, seventh Assembly district of New York, which was read and referred to the committee on privileges and elections.

Assembly Journal, 1867, vol. 1, page 43.

ASSEMBLY CHAMBER, *January 8, 1867.*

On motion of Mr. Chamberlain,

Resolved, That the committee on privileges and elections to which was referred the petition of Edward Mitchell, claiming the seat now held by Hon. Frank A. Ransom, have power to send for persons and papers, and that they be authorized to hold meetings for the purpose of taking evidence thereon, in such part of the State as they may deem proper.

Assembly Journal, 1867, vol. 1, page 61.

TESTIMONY ORDERED PRINTED.**ASSEMBLY CHAMBER, *February 7, 1867.***

By unanimous consent, on motion of Mr. Chamberlain,

Resolved, That the testimony taken before the committee on privileges and elections, in the matter of the election of Hon. Frank A. Ransom to the Assembly, from the seventh Assembly district, of the county of New York, contested by Edward Mitchell, Esq., be forthwith printed and placed upon the files of Assembly.

Assembly Journal, 1867, pages 313, 314; for testimony, see Assembly Document, 1867, vol. 4, No. 65.

REPORT PRESENTED.**ASSEMBLY CHAMBER, *April 20, 1867.***

Mr. W. S. Clark, presented the report of the committee on privileges and elections in the case of Frank A. Ransom, contested by Edward Mitchell, which was laid on the table and ordered printed.

REPORT OF THE COMMITTEE ON PRIVILEGES AND ELECTIONS IN
THE CASE OF FRANK A. RANSOM, CONTESTED BY EDWARD
MITCHELL.

To the Honorable, the Assembly of the State of New York:

The undersigned, your committee on privileges and elections, respectfully report, in the case of the seat of Hon. Frank A. Ransom, member from the seventh Assembly district, in the county of New York, contested by Edward Mitchell, that pursuant to resolution of this House, a sub-committee of the undersigned, consisting of Abram Hoffman and Wm. S. Clark, convened at the Metropolitan Hotel, New York, on the 23d day of January last, and proceeded to examine witnesses and take testimony in this case; that after the examination of one hundred and sixty witnesses, the further hearing of the case was adjourned to the 5th February, at Albany. That pursuant to adjournment, your committee met at Albany, all the members being present, and the parties appeared in person before your committee; when, after consultation, it was stipulated by the contestant and sitting member, that the testimony taken should be printed, that the committee might examine it, together with points to be submitted upon the part of the contestant, with a view of determining whether upon the proofs already given, together with that of the witnesses on the list served upon the sitting member not yet examined, there is any possibility that the contestant will make out a case to entitle him to the seat of the sitting member; and if in the view of the committee such possibility is found to exist, the contestant to be allowed to proceed with his proofs, and the sitting member to be allowed to introduce proof in rebuttal.

Your committee further report, that pursuant to the foregoing stipulation, they proceeded to the examination of the evidence in the case before them; and, that upon the evidence adduced, together with the evidence of the witnesses remaining to be called, they conclude that the contestant cannot make a case which will entitle him to a seat in this House, and therefore recommend the adoption of the following resolution:

Resolved, That the seat in this House for the seventh Assembly district, in the county of New York be, and hereby is awarded to Hon. Frank A. Ransom, the sitting member, and that the prayer of the petitioner, Edward Mitchell be, and is hereby denied.

WM. S. CLARK.

W. R. CHAMBERLAIN.

L. H. HISCOCK.

A. HOFFMAN.

THOS. J. CREAMER.

Dated ALBANY, *April* 16, 1867.

Assembly Journal, 1867, vol. 2, page 1820. Assembly Documents, 1867, vol. 10, No. 233.

Case of Stephen Baker and Lewis H. Gregory.

PUTNAM COUNTY — PETITION PRESENTED.

ASSEMBLY CHAMBER, *January* 2, 1867.

Mr. Travis presented the petition of Stephen Baker for the seat in the Assembly occupied by Hon. Lewis H. Gregory, of the county of Putnam, which was read and referred to the committee on privileges and elections.

Assembly Journal, 1867, page 39.

ASSEMBLY CHAMBER, *January* 8, 1867.

On motion of Mr. Chamberlain,

Resolved, That the committee on privileges and elections, to which was referred the petition of Stephen Baker, claiming the seat now held by Hon. Lewis H. Gregory, have power to send for persons and papers, and that they be authorized to hold meetings for the purpose of taking evidence thereon in such part of the State as they shall deem proper.

Assembly Journal, 1867, page 61.

REPORTS PRESENTED.

January 11, 1867.

Mr. Chamberlain, from the majority of the committee on privileges and elections, to which was referred the petition of S. Baker, contesting the seat of Hon. L. H. Gregory, reported thereon in writing, and recommended the adoption of the following resolution:

Resolved, That Stephen Baker is entitled to the seat held and now occupied by Lewis H. Gregory, and that said Gregory, who is properly the contestant, have the privilege of contesting the same.

Mr. W. S. Clark, from the minority of said committee, reported in writing adversely to the prayer of said petitioner.

The question being upon the adoption of the majority report,

Mr. Weed moved that the majority and minority reports of the committee on privileges and elections, in the case of the seat of Hon. Mr. Gregory, contested by Col. Baker, be laid upon the table, and that said reports, with the proceedings before the committee, be forthwith printed and placed upon the files of the members of this House.

Mr. Speaker put the question whether the House would agree to said motion, and it was determined in the affirmative.

Assembly Journal, 1867, page 79.

REPORTS OF MINORITY AND MAJORITY.

ASSEMBLY CHAMBER, January 15, 1867.

Mr. Chamberlain called from the table the report of the committee on privileges and elections, in the words following, to wit:

REPORT OF THE COMMITTEE ON PRIVILEGES AND ELECTIONS RELATIVE TO THE SEAT NOW HELD BY LEWIS H. GREGORY, OF PUTNAM COUNTY — MAJORITY REPORT.

The committee on privileges and elections, to which was referred the petition of Stephen Baker, Esq., claiming the seat in the Assembly now held and occupied by Lewis H. Gregory as

member of Assembly for the county of Putnam, would most respectfully report:

That the committee met in the city of Albany on the 9th day of January, 1867, and that the said contestants appeared in person, and with counsel, Waldo Hutchings, Esq.

The sitting member also appeared in person, with his counsel, Ira Shafer, Esq.

That from the returns of the board of canvassers of the county of Putnam, the following facts appeared, to wit:

That the whole number of votes cast for member of Assembly in the county of Putnam was two thousand seven hundred and thirty (2,730), of which Stephen Baker received one thousand three hundred and sixty (1,360); Lewis H. Gregory received one thousand three hundred and sixty-four (1,364); Col. Baker received one (1); S. Baker received five (5).

In view of these facts, the committee are of the opinion that the five votes cast for S. Parker should be allowed to Stephen Baker, and that the return of the board of canvassers of said county of Putnam shows, upon its face, that Stephen Baker was duly elected member of Assembly for said county, and they, therefore, recommend the adoption of the following resolution:

Resolved, That Stephen Baker is entitled to the seat held and now occupied by Lewis H. Gregory, and that said Gregory, who is properly the contestant, have the privilege of contesting the same.

L. H. HISCOCK.

W. R. CHAMBERLAIN.

ABRAHAM HOFFMAN.

MINORITY REPORT.

The undersigned, the minority of your committee on privileges and elections, to which was referred, with others, the case of Stephen Baker, contestant of the seat of Hon. Lewis H. Gregory, of Putnam county, respectfully state, that at an adjourned meeting of said committee, held on the evening of January 9th, inst.,

to settle the preliminary proceedings in said matter, the majority of said committee arrived at a conclusion, from which, and the report of said majority, they respectfully dissent, for the reasons following:

First. That by the certified return of the county canvassers of Putnam county, presented to your committee by counsel for the contestant, Stephen Baker, it appears that said canvassers, upon an estimate of the votes returned for the office of member of Assembly in said county, determined that the number of votes cast for Hon. Lewis H. Gregory was one thousand three hundred and sixty-four; that the number of votes cast for Stephen Baker, the contestant, was one thousand three hundred and sixty, and that the number of votes cast for S. Baker was five; which is evidence to the undersigned that said canvassers determined that said five votes were not votes for Stephen Baker, the contestant, and that said five votes ought not, therefore, in the absence of proof, be allowed to said Stephen Baker, contestant.

Second. It appears upon an examination of the certified canvass of the votes cast at the late election in the town of Southeast, in said county of Putnam, that the whole number of votes cast for Governor in said town was five hundred and six; and that the whole number of votes cast for member of Assembly in said town, including the five S. Baker votes, was five hundred and seven; making the aggregate number of votes cast for member of Assembly in said town, exceed the aggregate number of votes cast for Governor in said town by one vote.

Third. The Hon. Lewis H. Gregory, by his counsel, denied both the sufficiency and the accuracy of said certificate of the county canvassers of said county, and offered to show, by competent evidence, that four of said votes for S. Baker were corrected and allowed the contestant, Stephen Baker, in the canvass of the votes given in said town of Southeast, and were included in the number of votes returned for Stephen Baker, contestant, to the county canvassers by the board of inspectors of election in said

town of Southeast; also to show, by competent evidence, that in said county one illegal vote was cast for said contestant, and that in the canvass and estimate of the votes cast for member of Assembly in said county, said illegal vote was counted and allowed to the said contestant; also to prove that in said county one illegal vote cast for said Hon. Lewis H. Gregory was rejected, and not allowed said Gregory in the estimate and canvass of votes returned cast for said Gregory; all of which proof, in the opinion of the undersigned, should have been received and examined by the committee before making its award.

Fourth. It seems, to the undersigned, that the award of the seat to the contestant, Stephen Baker, with the right or leave to the said Lewis H. Gregory to contest the same is, in the face of the offered evidence, a conclusion altogether anomalous and unauthorized by precedent, and tending not only to complicate the question, but to embarrass both the House and the committee by necessitating both to sit in judgment upon their own decisions.

The undersigned, therefore, beg leave to report that, in their judgment, the whole question, with all the issues between the said Stephen Baker, contestant, and Hon. Lewis H. Gregory, should be recommitted to your committee for their examination and determination upon the evidence which may be adduced before it under the above offer, together with such additional evidence as shall be germane to the issue.

WM. S. CLARK.

THOS. J. CREAMER.

Dated ALBANY, *January 10, 1867.*

Assembly Document, 1867, volume 1, No. 12.

Mr. Millspaugh moved to substitute the minority report of the committee for that of the majority. Debate ensued.

ASSEMBLY CHAMBER, *January 16, 1867.*

Mr. Speaker put the question, whether the House would agree to said motion of Mr. Millspaugh, and it was determined in the negative.

Ayes, 43. Noes, 77.

STEPHEN BAKER AWARDED SEAT.

Mr. Speaker then put the question whether the House would agree to said majority report, and it was determined in the affirmative.

Ayes, 73. Noes, 41.

Mr. Speaker announced that the majority report of the committee on privileges and elections having been adopted, Stephen Baker was duly entitled to the seat now occupied by Hon. Lewis H. Gregory.

Whereupon, Mr. Stephen Baker appeared in the Assembly chamber, and the constitutional oath of office was administered to him by the Speaker.

Assembly Journal, 1867, vol. 1, pages 102-105.

PETITION OF LEWIS H. GREGORY PRESENTED.

ASSEMBLY CHAMBER, *January 17, 1865.*

Mr. Millspaugh presenting the petition of Lewis H. Gregory of Putnam county, contesting the seat for member of Assembly now held by the Hon. Stephen Baker, which was read and referred to the committee on privileges and elections.

Assembly Journal, 1867, page 120.

TESTIMONY ORDERED PRINTED.

ASSEMBLY CHAMBER, *March 5, 1867.*

By unanimous consent, on motion of Mr. Hiscock:

Resolved, That the clerk be directed to have the testimony taken before the committee on privileges and elections, in the matter of the election of Stephen Baker as member of Assembly from the county of Putnam, contested by Lewis H. Gregory, printed forthwith and placed upon the files of the Assembly.

Assembly Journal, 1867, page 523. See testimony, Assembly Documents, 1867, vol. 6, No. 105.

REPORT OF COMMITTEE PRESENTED.

ASSEMBLY CHAMBER, *April 20, 1867.*

Mr. Chamberlain presented the report of the committee on privileges and elections in case of Lewis H. Gregory, contested by Stephen Baker, which was laid on the table and ordered printed.

REPORT OF THE COMMITTEE ON PRIVILEGES AND ELECTIONS IN
THE CASE OF LEWIS H. GREGORY, CONTESTANT OF THE SEAT
HELD BY STEPHEN BAKER.

The committee on privileges and elections, to which was referred the petition of Lewis H. Gregory, Esq., claiming the seat in the Assembly now occupied by Stephen Baker, as a member of Assembly from the county of Putnam, which petition is hereunto attached, most respectfully report, that on the fifteenth day of January, 1867, the committee met, pursuant to adjournment, at the Capitol, in the city of Albany, and decided that the contestant should serve upon the sitting member, before the next meeting of the committee, a statement of the grounds upon which he claims the seat of the sitting member, and the name of all voters claimed to be illegal; and that the sitting member serve a like statement upon the contestant; both the sitting member and the contestant complied with this requisition of the committee, and on the meeting of the committee, held January 22d, it was agreed by and between the respective parties that the investigation should be confined exclusively to the question of the disposition of the five S. Baker votes, and that no evidence should be given during the hearing touching any other question. The parties not being ready to examine witnesses, the committee adjourned to the twenty-seventh of February, and on that day proceeded to a hearing of the evidence. It appears from the return of the inspectors of the town of Southeast, that the whole number of votes given for member of Assembly in said town, was five hundred and seven (507), of which Stephen Baker received two hundred and seventy; Lewis H.

Gregory two hundred and thirty-two; and S. Baker received five (5). The contestant claims that the five S. Baker votes were counted and included in the two hundred and seventy accredited to Stephen Baker; upon this, the only question in controversy, your committee examined the inspectors of election of the town of Southeast, the clerks who officiated at the said election, and several other witnesses who stood by while the vote was being counted; and your committee, after a careful examination of the evidence, are of the opinion that the return of the inspectors of the town of Southeast, and the return of the board of canvassers of the county of Putnam are true; that the five S. Baker votes were not counted and allowed to Stephen Baker, and your committee are clearly of the opinion that the five S. Baker votes should have been counted for Stephen Baker, and that had this allowance been made, it would have given Stephen Baker a majority of *one* over all other candidates; and your committee therefore recommend the adoption of the following resolution:

Resolved, That Stephen Baker was duly elected member of Assembly from the county of Putnam, at the last general election, by a majority of all the votes cast for member of Assembly in said county at said general election, and that he is therefore entitled to retain the seat in the Assembly now held by him.

W. R. CHAMBERLAIN.

WM. S. CLARK.

L. H. HISCOCK.

THOS. J. CREAMER.

A. HOFFMAN.

Assembly Documents, 1867, volume 4, No. 80. Assembly Journal, 1867, page 1820.

Case of Henry Clausen, Jr., and George B. Van Brunt.

TWENTIETH DISTRICT, COUNTY OF NEW YORK — PETITION OF
HENRY CLAUSEN, JR., PRESENTED.

ASSEMBLY CHAMBER, *January 7, 1868.*

Mr. Hartman presented the petition of Henry Clausen, Jr., claiming the seat of Hon. George B. Van Brunt, from the twentieth district, New York, which was ordered to be referred to the committee on privileges and elections, when appointed.

Assembly Journal, 1868, vol. 1, page 10.

TESTIMONY ORDERED PRINTED.

ASSEMBLY CHAMBER, *March 9, 1868.*

On motion of Mr. F. H. Woods,

Resolved, That the testimony taken, and to be taken, in the matter of the contested election case in which Henry Clausen, Jr., is contestant and George B. Van Brunt is sitting, be printed under the direction of the clerk of the House.

Assembly Journal, 1868, vol. 1, page 419.

REPORT OF COMMITTEE IN FAVOR OF GIVING SEAT TO HENRY
CLAUSEN, JR.

ASSEMBLY CHAMBER, *April 3, 1868.*

Mr. F. H. Woods, from the majority of the committee on privileges and elections, submitted in writing a report in the case of the contested seat of G. B. Van Brunt.

Mr. Pitts moved to lay said report on the table, that it be printed and made the special order for Tuesday next.

Mr. Speaker put the question whether the House would agree to said motion, and it was determined in the negative.

Ayes, 47. Noes, 50.

The report was then read.

Mr. F. H. Woods moved to lay said report on the table, and that it be printed.

Mr. Hartman moved to amend by adopting the report.

Mr. Speaker announced the question to be upon the motion of Mr. F. H. Woods.

Mr. Speaker then put the question whether the House would agree to said motion of Mr. Woods, and it was determined in the affirmative.

Ayes, 57. Noes, 45.

Mr. Hartman moved to make the consideration of said report the special order for Tuesday next, immediately after reading the Journal.

Mr. Speaker put the question whether the House would agree to said motion, and it was determined in the affirmative, two-thirds of all the members present voting in favor thereof.

Assembly Journal, 1868, pages 773, 774, 775.

SPECIAL ORDER — CONSIDERATION OF.

ASSEMBLY CHAMBER, *April 7, 1868.*

Mr. Speaker announced the special order, being the consideration of the majority report and resolution relative to the contested seat of the Hon. George B. Van Brunt, in the words following:

April 3, 1868.

The committee on privileges and elections respectfully report:

That they have examined fully and with great care into the case of the seat of George B. Van Brunt, from the twentieth Assembly district of the city of New York, which is contested by Henry Clausen, Jr.

Each party has been represented before the committee by able and zealous counsel, who have contested the case at every point, and over two hundred and fifty witnesses have been sworn and examined, most of whom were cross-examined with great particularity, and many of them at great length. The contestant opened his case by disputing the correctness of the returns from the fourth, sixth, seventh and ninth districts of the nineteenth ward, which

were returned as giving a majority of eight hundred and eight for Mr. Van Brunt over Mr. Clausen.

In respect to the other nine districts comprised in that Assembly district, being the first, second, third, fifth, eighth, tenth, eleventh, twelfth and thirteenth districts of the nineteenth ward, which gave Mr. Clausen a majority of seven hundred and two over Mr. Van Brunt, there was no contest. The contestant showed, in respect to the four contested districts, that there was a great disparity between the votes returned in those districts for Secretary of State and for member of Assembly. In the four districts, Nelson, the democratic candidate for Secretary of State, received one thousand four hundred and eighty-three votes, and McKean, the republican, four hundred and four; but for Assembly, Clausen, democrat, is allowed only four hundred and forty-six votes, other democrats only two hundred and seventeen votes, while Van Brunt, republican, is allowed one thousand two hundred and fifty-four; thus giving him five hundred and ninety-one majority over all the democratic candidates combined, in four districts, which gave Nelson, democrat, one thousand and seventy-nine majority for Secretary of State. The other nine districts gave Nelson two thousand four hundred and eighty-nine, and McKean, republican, eight hundred and fifty-four votes for Secretary of State; and for Assembly, Clausen, one thousand six hundred and forty-four votes, other democratic candidates, six hundred and thirty-eight, and Van Brunt, nine hundred and forty-two. In these districts, the variance is no greater than is frequently manifested in the returns of the votes cast for different candidates on the same ticket. In the four contested districts, Mr. Van Brunt is allowed a vote more than three times as large as the vote received by the candidate of his party for Secretary of State, and no less marvelous is it that the combined strength of the democratic candidates for Assemblyman, could not secure to them an aggregate vote one-half as large as that of the democratic candidate for Secretary of State. The wonderful character of the returns

from the four contested districts is enhanced by the fact that the districts do not lie together, but are separated by intervening districts. It is more than strange, that in certain spots, a candidate receives large majorities, while every other candidate of his party is largely in the minority, while in the districts surrounding the same, on every side, he only receives about a party vote. We have stated the character of the returns from these four districts, because it justifies a grave suspicion that they are false and fraudulent, yet we have not felt warranted in rejecting the returns merely for this reason.

The counsel for Mr. Clausen began by calling as witnesses persons who voted in the seventh election district, to prove for whom they voted.

The examination of witnesses for this purpose occupied a large amount of time, and the committee afterwards deemed it best, as they were satisfied from the testimony taken in respect to that district, that the seat must be awarded to Mr. Clausen, to restrict the investigation to the seventh district. This they were enabled to do as the sitting member did not charge any wrong doing in respect to any district.

In the seventh district it appeared by the testimony of one of the poll clerks that according to the poll list kept in that district at the general election in November last, three hundred and forty-two persons voted at that election for member of Assembly. Of those persons, two hundred and twenty-one were examined as witnesses; of these, one hundred and twenty-six testified that they voted for Mr. Clausen; and it was also shown, by the testimony of thirty-two others, in connection with the testimony of corroborative witnesses, that they also voted for Mr. Clausen, making a total of one hundred and fifty-eight who are proved, as claimed by the contestants, to have voted for him.

Objection may reasonably be taken as to the sufficiency of the proof in respect to some of these, but the number is not, probably, over twelve, and certainly not over twenty. If exception could

justly be taken in respect to fifty of them, Mr. Clausen would, nevertheless, be entitled to his seat upon the testimony taken. The number of votes allowed to him by the canvassers in this district was only forty-seven.

Mr. Keegan, another democratic candidate, was only allowed twenty-four votes by the canvassers, yet thirty persons testify that they voted for him; and Mr. Cochran, a third democratic candidate, was allowed fourteen votes, but is proved to have received sixteen.

Eight other persons testified that they voted for a democratic candidate, and seven others that they did not know for whom they voted. It is an impressive fact that of the two hundred and twenty-one voters examined, only two testified that they voted for Mr. Van Brunt, or manifested any desire to have done so. If these two are added to the one hundred and twenty-one persons not examined, the aggregate is less than one-half the number of the votes given to Mr. Van Brunt by the canvassers.

Another peculiarity of this case is the failure of the two sworn officers, whose duty it was to make the canvass and return, to establish, upon their examination, the correctness of the canvass. Mr. Davis, who was appointed as the democratic canvasser, and by whom alone the canvass was made, is, we are constrained to say, doubtful in his answers, and merely says: "Our returns are what we have certified to," and "it was found that George B. Van Brunt received two hundred and fifty-four, Clausen forty-six, Cochran fourteen, and Keegan twenty-four."

Mr. Styles, the republican canvasser, who was placed at the canvass on the side of the table opposite to Mr. Davis, and put to work keeping tally, knows nothing about the canvass, except that he saw Mr. Davis put a piece of paper down on the table every time he counted a vote.

Mr. Hibbard, who was appointed as the democratic poll clerk, is very uncertain in his testimony, and contradicts himself as to whether or not he kept tally.

Mr. Gregory, the republican poll clerk, when asked who, from

the size of the piles on the table, had the most votes, answered: "Mr. Clausen, decidedly."

Another fact proved deserves especial mention, and cannot be too strongly reprehended. Mr. Davis, by whom alone the canvass was made, had, unfortunately made a bet of two hundred dollars that Mr. Clausen would not be elected. It could scarcely have been supposed that any election officer would allow himself to create such an interest in the success or defeat of a candidate. Your committee is of opinion, aside from this case, that it should be made by law a misdemeanor for any person to act as an election officer who has such an interest.

The election laws applicable to the city of New York require that the poll clerks shall keep tallies at the canvass, and file them in the police department. It is very doubtful whether any tallies were kept by them of the Assembly canvass, and certain that none can be found on file in the election bureau of the police department.

Mr. Van Brunt, upon the canvassers' return, had two hundred and seven majority in this election district, which is one hundred and one more than the majority by which he is declared to have been elected in the Assembly district. Upon that return, it would require proof that fifty-four votes returned for him were actually given to Mr. Clausen, to entitle the latter to a seat; but the number is less, as is proved that Mr. Keegan and Mr. Cochran also received more votes than were returned for them. The committee are of opinion that it is proved that Mr. Clausen received in that district about one hundred more votes than are returned for him; and that, whether the return from that district is rejected as fraudulent, or a new adjustment of the vote is made upon the testimony taken, it is manifest that Mr. Clausen was elected by at least one hundred majority.

There is also ground, besides the wonderful disparity in the votes as returned, which has already been referred to, for believing that the returns from the fourth and sixth districts were also fraudulent. No tallies by the poll clerks were filed for these districts,

and three of the four canvassers are witnesses for Mr. Van Brunt, and proved that they were electioneering in the seventh district for Mr. Van Brunt. They do not appear creditably upon the showing of their own testimony. One of the three was also appointed as a democratic canvasser.

The committee recommend the adoption of the following resolutions:

Resolved, That Henry Clausen, Jr., is entitled to a seat as a member of this House from the twentieth Assembly district of the city of New York.

Resolved, That George B. Van Brunt is not entitled to the seat now occupied by him.

Respectfully submitted.

F. H. WOODS.

JAMES LOUGHRAN.

JOHN B. MADDEN.

JACKSON A. SUMNER.

Assembly Document, 1868, vol. 10, No. 128. See Testimony following report.

MINORITY REPORT PRESENTED.

Mr. Pitts, from the minority of said committee, presented the following report:

To the Hon. the Assembly of the State of New York:

The undersigned, one of the committee on privileges and elections, to which was referred the petition of Henry Clausen, Jr., who claimed the seat which had been awarded by the official canvass to George B. Van Brunt, respectfully reports that he is constrained to dissent from the conclusion arrived at by the majority of the committee, for the following reasons:

The contestant presented his petition and served a notice upon the sitting member, specifying therein the following as the grounds upon which he relied to establish his claim:

1. That a large number of votes given for Clausen were fraudulently counted and returned for Van Brunt.

2. That the canvass of votes was made and conducted in a secret and clandestine manner.

3. That unauthorized persons were allowed to participate in counting and returning the votes.

4. That some of the canvassers had a pecuniary interest in the result, adverse to said Clausen.

5. That no announcement of the result of the canvass was made, as required by law.

The second, third and fifth of these grounds were abandoned by the contestant before the committee, and as to the fourth, it was only claimed as evidence to cast suspicion upon the good faith of one of the canvassers, who was himself a member of the party of which Mr. Clausen claimed to be the candidate.

There was, therefore, but one ground left of those specified in the contestant's notice, upon which he could rely, and that was "that a large number of votes cast for Clausen were fraudulently counted and returned for Van Brunt."

The only evidence produced tending to show that there was any such fraudulent counting and canvass of votes, is the inference attempted to be drawn from the testimony of witnesses who testified (in a very loose and unreliable manner in many instances) that they voted for Clausen. No other or more direct evidence was adduced by the contestant to prove any fraud or irregularity in the canvass. On the part of the sitting member, the fairness and regularity of the canvass was proved affirmatively, by unimpeached and conclusive evidence.

It is submitted that direct and positive evidence, such as was produced by the sitting member in this case, cannot be rebutted by any inference, however strong, and especially when, as in this case, the inference points equally strong in various directions. The contestants having failed to make out the specific frauds and irregularities upon which he claimed to rely, has, according to well established principles, failed to make good his claim to the con-

tested seat. It is therefore respectfully submitted that the contestant is not entitled to be awarded the seat, upon the specific ground that he has failed to prove either of the frauds or irregularities set forth in his notice.

If it shall be determined that the contestant should be allowed the benefit of the evidence produced, without regard to the grounds set forth in his petition and notice, and without regard to the surprise which may be thus sprung upon the sitting member, it is further submitted that the contestant should, notwithstanding, be declared not entitled to the disputed seat. It is confidently claimed that no case can be found where a legislative body has allowed one of its members, holding an official certificate of his election, to be unseated solely upon the testimony of a majority of the voters in his district that they cast their ballots for the contestant, without some other evidence of some specific fraud or irregularity. This specific point was made by the sitting member, before this committee, upon the investigation of this case, and the counsel for the contestant was challenged to produce a single precedent for such a course. None was produced, and it is confidently asserted that none can be found in any of the reported cases, either State, national or parliamentary. It is respectfully but earnestly insisted that no such precedent should be established. The mischiefs which would spring from it would by far counterbalance its benefits. It would open every closely contested election to what would virtually amount to a new election.

The contest would be changed from the ballot-box to the witness box, and the frauds and perjuries of the election would be repeated before the tribunals investigating the same. The change of a few venial voters from one side of the contest to the other, might entirely change the result of a fair election, whenever the case was a closely contested one, and the reliance of the contestants would be upon the weakness or corruption of purchasable witnesses, rather than upon fair proof of the ballot of the voter.

In this State, where the ballot is secret, the danger of fraud and

perjury in such contests is too apparent to need further argument or illustration.

For these reasons I beg leave to submit to this House the following resolution:

Resolved, That Hon. Geo. B. Van Brunt was legally elected member of Assembly for the twentieth Assembly district of the city of New York, at the last general election.

EDMUND L. PITTS.

April 6, 1868.

Assembly Journal, 1868, vol. 1, pages 821, 822, 823.

Mr. Pitts moved the adoption of the minority report and the resolutions accompanying it, as a substitute for the majority report.

Mr. Speaker put the question, on receiving for consideration the said minority report, and it was determined in the negative.

Ayes, 46. Noes, 65.

REPORT OF THE MAJORITY ADOPTED — HENRY CLAUSEN, JR.,
AWARDED SEAT.

Mr. Speaker then put the question, on the adoption of the majority report and resolutions, and it was determined in the affirmative.

Ayes, 64. Noes, 44.

PRIVILEGES OF THE FLOOR GRANTED TO MR. VAN BRUNT.

On motion of Mr. Hartman, the privileges of the floor were extended to the Hon. George B. Van Brunt for the remainder of the session.

MR. CLAUSEN SWORN IN.

Mr. Clausen was then sworn in as a member of the Assembly by Mr. Speaker.

Assembly Journal, 1868, vol. 1, pages 819, 820, 821, 822, 823, 824.

Case of John Raber and Jacob Worth.

SIXTH DISTRICT, KINGS COUNTY — TESTIMONY REFERRED TO
COMMITTEE.

ASSEMBLY CHAMBER, *January 7, 1868.*

On motion of Mr. Keady:

Resolved, That the testimony taken in the case of John Raber, contesting the seat of Jacob Worth, of the sixth district of Kings county, be referred to the committee on privileges and elections, when appointed, said testimony having been deposited with the clerk of this House pursuant to law.

Assembly Journal, 1868, page 34.

PETITION PRESENTED.

ASSEMBLY CHAMBER, *January 22, 1868.*

Mr. Keady presented the petition of John Raber, asking to be admitted to the seat now occupied by Jacob Worth, contested, and it was referred to the committee on privileges and elections.

Assembly Journal, 1868, page 121.

MAJORITY REPORT PRESENTED.

ASSEMBLY CHAMBER, *March 10, 1868.*

Mr. F. H. Woods, from the majority of the committee on privileges and elections, submitted a report in writing, upon the contested seat of Hon. Jacob Worth of Kings county, the sitting member, contested by John Raber of said county, which report was received and read.

REPORT OF THE COMMITTEE ON PRIVILEGES AND ELECTIONS IN
THE MATTER OF THE ELECTION OF JACOB WORTH, AS MEMBER
OF ASSEMBLY, FOR THE SIXTH ASSEMBLY DISTRICT OF THE
STATE OF NEW YORK, CONTESTED BY JOHN RABER.

To the Assembly:

The standing committee on privileges and elections, to whom was referred the memorial of John Raber, claiming that he was

and was sufficient to establish, in the opinion of the committee, that Mr. Raber had received a majority of the votes in that Assembly district. That the returns on file were not those originally made out by the canvassers, except the one filed with the metropolitan police, which had been improperly altered, so as to do injustice to Raber.

On the part of the sitting member, evidence was introduced to show that the result was announced and returns were first made out giving one hundred and sixty-eight to Raber and three hundred and seventy-five to Mr. Worth, solely through a mistake of one of the poll clerks in reading an "0" made by him in pencil in putting down Raber's vote as "6," that is one hundred and sixty-eight instead of one hundred and eight, and that this mistake was not discovered until after midnight, and then by Mr. Ward, a brother-in-law of Mr. Worth, and one of the canvassers. That it was then corrected in all the returns (no returns having been then signed), and the alterations in the returns on file in the metropolitan police office were made by the very poll clerk who was sworn by the committee, but who testified that he did not make them or know of their being made. It is impossible to harmonize this account with the statements of the witnesses of the contestant, and the committee were compelled to reject either the one or the other.

The committee, after careful consideration, have been unable to give to this explanatory evidence on the part of the sitting member equal weight with that of the contestant. Their reasons, among others, are: That the account is improbable intrinsically, and rendered more so by an inspection of the paper, where the figures occur, in which the figure claimed to be an "0" is unmistakably a "6," and manifestly intended to be by the person who made it; the figures "375" and "168" appear in several places on the same paper, and in one place these figures are carefully erased, and "435" and "108" written over them.

2d. That the witnesses who speak to the discovery of the mistake, are, with one exception, confessedly partial to the sitting

member. Two of them were the canvassers; one of whom is Mr. Worth's brother-in-law, and the other is his most "intimate friend," whose appointment as canvasser of this election district, in place of another indifferent person originally appointed, the circumstances, shown pointedly, lead the committee to the belief, was procured through the active interference and exertions of Mr. Worth. Without intending any unjust reflections, the committee cannot reconcile this interference of Mr. Worth with the appointment of canvassers of this district, so as to procure *both* devoted to his interests, with any fair design as to the canvass. The third was the associate counsel for Mr. Worth on the investigation before the mayor, and admitted himself to be his backer, and to have bet considerable sums of money upon, and boasts of his superior management of Mr. Worth's election. It was not, according to his own account, until after this gentleman's arrival at the polls, after twelve o'clock at night, and after all other bystanders had left the place, that the *mistake* was discovered.

3d. No attempt was made to correct the reports sent to the public prints at the time, and, although several of the witnesses were before the mayor, no such pretense was there made, nor was it publicly disclosed or explained to the contestant, or as far as appears, to any other person, that this mistake was made or had been discovered, or how it happened that the slip of the result sent by the poll clerk to police headquarters for general information was not correct.

On the other hand, the entire impartiality and want of interest on the part of three witnesses relied upon by the contestant, do not appear to be questioned. Under these circumstances, the committee have regarded their statements as more worthy of credit than the explanations, inconsistent therewith, spoken of by the witnesses of the sitting member.

It is proper to add that various other circumstances disclosed in the evidence also tend, in the opinion of the committee, to the same conclusion.

The committee are therefore of the opinion that John Raber actually received two thousand two hundred and fifty-nine votes instead of two thousand one hundred and ninety-nine votes, and that Mr. Worth actually received but two thousand one hundred and sixty-nine votes, instead of two thousand two hundred and twenty-nine, and Mr. Raber was therefore elected by a majority of ninety, and is entitled to the seat occupied by Mr. Worth.

The committee recommend the passage of the following resolution, herewith submitted:

Resolved, That John Raber was duly elected member of Assembly from the sixth district of the county of Kings, and as such, is entitled to the seat in this body occupied by Jacob Worth, and that the said John Raber be sworn in, and admitted to his seat in this House as such member.

Respectfully submitted.

FRANCIS H. WOODS,
JOHN B. MADDEN,
JACKSON A. SUMNER,
JAMES LOUGHRAN.

See testimony accompanying report, pages 7-45.
Assembly Documents, 1868, vol. 8, No. 83.

Mr. Pitts moved to make the consideration of said subject a special order for Friday next, immediately after the reading of the Journal.

Mr. Speaker then put the question, whether the House would agree to said motion of Mr. Pitts, and it was determined in the affirmative.

Assembly Journal, 1868, vol. 1, page 429.

CONSIDERATION OF REPORTS.

ASSEMBLY CHAMBER, *March 13, 1868.*

Mr. Speaker announced the special order for this morning the consideration of the reports of the majority and minority in the

case of the contested seat of Hon. Jacob Worth, contested by John Raber.

REPORT OF MINORITY PRESENTED.

Mr. Pitts, from the minority of the committee, presented the following report and resolution, and moved the adoption of the same as a substitute for the majority report and resolution.

To the Honorable the Assembly:

The undersigned, member of the committee on privileges and elections, in the matter of Hon. John Raber, who contests the election of Hon. Jacob Worth, and claims his seat in this House, most respectfully reports: That he is unable to agree with the majority of the committee in awarding the seat to the contestant.

It is claimed by the contestant that his vote was changed in the sixth district of the seventeenth ward in the city of Brooklyn from one hundred and sixty-eight to one hundred and eight, and the vote of Mr. Worth changed from three hundred and seventy-five to four hundred and thirty-five.

To sustain this claim, the contestant introduces witnesses Lang and Kleinlien, who are really the only witnesses testifying upon this point. There was other evidence introduced but it is not at all clear or explicit, and is susceptible of reasonable explanation, sustaining the sitting member — in fact the balance of the witnesses do not swear to this charge at all.

Upon the part of the sitting member, there were introduced witnesses Cunningham, Lindsley and Ward, who unqualifiedly contradicted the witnesses of the contestant, and testify that the vote in this election district was honestly returned. They testify that the facts are, that a mistake was discovered in the vote of both Raber and Worth, and this mistake was corrected; that Lang, who was present himself, aided in correcting this mistake. Upon this latter point, Lang is contradicted by two witnesses.

The contestant holds the affirmative of this issue, and every presumption of law is in favor of the validity of the election, and we should not turn Mr. Worth out of his seat until convinced by proof

that he is not entitled to the same. The sitting member has produced more witnesses and evidence before the committee than the contestant, and of as reliable a character. The evidence of Raber's witnesses can only be harmonized by allowing Mr. Worth his seat. We should not listen to what has been said outside of this case, but decide it upon the evidence and the law, which, in this instance, demands that Mr. Worth retain his seat. I, therefore, now respectfully report and recommend the adoption of the following resolution:

Resolved, That Hon. Jacob Worth was legally elected member of Assembly from the sixth Assembly district of the State of New York.

EDMUND L. PITTS.

March 13, 1868.

Mr. Speaker put the question, whether the House would agree to said motion of Mr. Pitts, and it was determined in the negative. Ayes, 47. Noes, 70.

REPORT OF MAJORITY ADOPTED — JOHN RABER AWARDED SEAT.

Mr. Speaker put the question, whether the House would agree to the adoption of the majority report and resolution, and it was determined in the affirmative. Ayes, 72. Noes, 46.

MR. RABER SWORN IN.

The Hon. John Raber then appeared, and was sworn in by the Speaker, and took his seat as a member of this House. Assembly Journal, 1868, vol. 1, pages 454 to 459.

Case of Wm. C. H. Sherman and George K. Smith.

FIRST DISTRICT, ORANGE COUNTY — PETITION OF GEORGE K. SMITH, PRESENTED.

ASSEMBLY CHAMBER, *January 7, 1868.*

Mr. Pitts presented the petition of George K. Smith, contesting the seat of Wm. C. H. Sherman, of the first district, Orange county.

Ordered, That said petition be referred to the committee on privileges and elections, when appointed.

Assembly Journal, 1868, page 11, vol. 1. See Assembly Documents, 1868, vol. 10, No. 125.

REPORT OF COMMITTEE PRESENTED.

ASSEMBLY CHAMBER, *April 17, 1871.*

Mr. F. H. Woods, from the committee on privileges and elections, submitted their report in writing relative to the contested seat of Wm. C. H. Sherman, by George K. Smith, contestant, which on his motion was laid on the table and ordered printed, and made a special order for Wednesday next, immediately after the reading of the Journal.

See Assembly Journal, 1868, page 1108.

REPORTS CONSIDERED — MR. SHERMAN AWARDED SEAT.

ASSEMBLY CHAMBER, *April 22, 1868.*

Mr. F. H. Woods, called up for consideration, the following report of the committee on privileges and elections, being the special order for the day.

April 15, 1868.

Your committee directed the contestant and sitting member respectively to file and serve allegations, in which the points at issue were definitely settled; and being attended by the parties and their counsel, proceeded to take testimony upon the points presented, which testimony was mostly confined to the proceedings of

the board of county canvassers, as to the votes given at the poll of the fourth ward of the city of Newburgh. And, on the part of the contestant, it was proved that the board of county canvassers of the county of Orange, upon proofs by affidavits of the falsity of the certificates, excluded from the canvass made by them the votes returned by the inspectors for such fourth ward for member of Assembly, and certified the vote of the whole Assembly district at two thousand nine hundred and sixty-three (2,963) votes for William C. H. Sherman, and two thousand nine hundred and forty-two (2,942) for George K. Smith.

The certificate thus rejected by the board of county canvassers stated that William C. H. Sherman received two hundred and thirteen votes, and that George K. Smith received three hundred and twenty-four votes in the fourth ward of the city of Newburgh. And it was claimed by the contestant that the votes thus certified ought to have been counted by the county canvassers, which would have given to the contestant a majority of ninety votes in the Assembly district.

The contestant further claimed that the county canvassers having erred in excluding these votes, it was the duty of your committee to receive no further evidence, but to report that the contestant was entitled to his seat.

Your committee, after mature deliberation, decided that it ought not to close the investigation at this stage; that whether the board of county canvassers was right or wrong in its decision was not the question referred to your committee, but that the question to be reported upon was, which candidate was actually elected; and that that question could only be decided by taking testimony, for the purpose of ascertaining how many votes were actually taken and canvassed for each candidate at the poll of the fourth ward of the city of Newburgh. That was the question put in issue between the parties, and the one upon which alone the right to the seat was to be determined. All the evidence offered on both sides was accordingly taken, for the purpose of proving what took place at the

counting and canvassing of the votes. It was proved that after the poll had been closed, the inspectors, aided by the clerks, proceeded to count the votes, beginning with the State ticket, taking next the judiciary, and last the votes for member of Assembly. Each counted the portion of ballots allotted to him, and gave the result of his count to John W. Little, one of the clerks, who footed the whole on his tally sheet and announced the several results to the board in their presence, and in the hearing of bystanders in an adjoining room. Such announcement showed two hundred and sixty-seven votes for Mr. Sherman and two hundred and sixty-three votes for Mr. Smith. (Testimony of Little, page 50.) And the same result, as to Assemblyman, was afterward stated by Mr. Wiltsie, one of the inspectors. Surprise having been expressed at the result, Mr. Booth, another inspector, suggested that the ballots should be counted again, but Mr. Wiltsie said there was no necessity for counting the ballots again, for Mr. Sherman had four majority (page 51). That Mr. Little went through the figures two or three times, with the help of Mr. Wiltsie and Mr. Thorne, also an inspector, looking over his shoulder, and that the result was found to be accurate and entered upon the tally sheet; that the tally sheet contained the names of all the candidates, with the number of votes opposite each name (page 51).

That these numbers, viz., two hundred and sixty-seven for Mr. Sherman, and two hundred and sixty-three for Mr. Smith, were the numbers actually ascertained and entered upon the tally sheet, is placed beyond controversy by the fact that at the time of the completion of the tally sheet, Mr. Little copied from it, and upon a complete set of the straight tickets, all the results, placing the number of votes received by each candidate opposite his name. These tickets he had carefully preserved, and he produced them before the committee (pages 52, 68 $\frac{1}{2}$), and they are annexed to this report (page 78).

That two hundred and sixty-seven votes were counted and announced for Mr. Sherman, and two hundred and sixty-three votes

for Mr. Smith, is also proved by Mr. Thorne, an inspector (page 33), and by Mr. Hearne (page 42), who got these figures from Mr. Wiltsie after the canvass and before the certificate was made out, and sent them to the headquarters of one of the political parties (pages 42 and 43), and by Mr. Chrissey, one of the clerks of the election (pages 60 and 61). It is also proved by different witnesses, that after the result was ascertained, it was announced by those engaged in the canvass that Mr. Sherman was "four ahead," or had "four majority" (pages 33, 43, 51, 60, 61). In the face of all this testimony, it appears that in the certificate which was made out and signed by the inspectors, it was stated that Mr. Smith received three hundred and twenty-four votes, and Mr. Sherman two hundred and thirteen votes, and the mistake, if it was such, occurred in the following manner: Mr. Little commenced filling up the certificate but, before proceeding far with it left the room, after handing his tally sheet to Mr. Wiltsie. Thereupon, Mr. Booth proceeded to fill up the certificate, Mr. Wiltsie calling off the numbers for that purpose from the tally sheet. It seems Mr. Wiltsie called off three hundred and twenty-four votes as having been given for Mr. Smith, and two hundred and thirteen votes for Mr. Sherman. After the certificate was filled up it was signed by all the inspectors. Mr. Thorne says he was engaged in conversation with Mr. Chrissey at the time, and did not hear the result called off by Mr. Wiltsie for member of Assembly, and that he would not have signed the certificate if he had not supposed the numbers inserted were two hundred and sixty-seven and two hundred and sixty-three (page 33).

It is true, Mr. Booth and Mr. Wiltsie both swear to having seen the tally sheets at the time the results were furnished by the latter to the former for the purpose of being entered in the certificate, and that they think they were correctly called off. But this weighs but little against the very clear and unanswerable evidence of the other witnesses, and of the copy of the tally sheet itself. It is most charitable to suppose that the figures they saw, and which Mr. Wiltsie called off, were those belonging to other candidates;

for it is a singular fact, if not a controlling one on this point, that it happens that three hundred and twenty-four votes were, as appears by the copy of the tally sheet, given for David J. Gedney, the republican candidate for county judge, and two hundred and thirteen votes were given for Lewis Little, a democratic candidate for coroner, and it may have happened that in the haste of referring to the tally sheet the wrong numbers were seen and called off (page 78).

That the numbers actually called by Mr. Wiltsie and inserted by Mr. Booth in the certificate, were not those belonging to the candidates for member of Assembly, seems to your committee to be established by Wiltsie himself, who, though with reluctance previously manifested, testified, on page 18 of the evidence, as follows:

“ Allow me to correct myself. I do remember hearing Mr. Little say that Sherman had *four majority*, or was *four ahead*; whether it was four majority or four ahead, I don't know, but I know that was said.” And he testified, on page 22, that this was said at the close of the computation of the vote for Assembly. This expression can be reconciled only with the figures stated by Mr. Little, which showed Mr. Sherman had four more votes than Mr. Smith. It was applicable to no comparison with any other candidate.

The democratic candidate for Secretary of State had two hundred and eighteen votes. The republican candidate for that office had three hundred and thirty-one votes. If Mr. Sherman had two hundred and sixty-seven votes, he had therefore, forty-nine votes more than the former, and sixty-four less than the latter (page 78). That Mr. Sherman ran ahead of his ticket is in proof (page 56), and it was shown that sixteen republicans had made affidavit that they voted for him (page 57); yet, the number of votes given to him by the certificate as filled up by Mr. Booth, was the lowest of all the nineteen democratic candidates voted for at that poll, except two (page 78). In every respect in which your committee have been able to view the evidence, the conclusion seems irresistible that the number of votes for the respective candidates were two

hundred and sixty-seven and two hundred and sixty-three, and not the number stated in the certificate signed by the inspectors.

Neither Mr. Wiltsie nor Mr. Booth profess to have any knowledge on the subject of the number of votes taken, except what is derived from the tally sheet; and inasmuch as the witnesses on both sides refer to the tally sheet as furnishing the true figures, and the only question is as to what these figures were, there is a natural desire to find the tally sheet, that it may speak for itself. But it is shown by the evidence that the tally sheet as well as the Assembly ballots were taken in charge by Mr. Wiltsie, and were by him destroyed about ten o'clock in the forenoon of the next day (pages 20 and 21).

Thus, by no agency of Mr. Sherman's friends, but by the act of the same person who furnished the figures to Mr. Booth to insert in the certificate, and who is now called as the chief witness against him, was the best evidence for correcting the error destroyed.

It seems to your committee fortunate for the ascertainment of truth, that a copy had been kept by Mr. Little.

At a late stage of the session, the contestant asked your committee to adjourn to Newburgh and examine the persons who had voted at the election, for the purpose of proving for whom their votes were cast.

After careful consideration your committee came to the conclusion, that such testimony, judging from some of that description already taken (page 31) would be of a far less satisfactory character than that relative to the counting of the ballots. The fact that many voters do not look at the inside of the folded ballots stands in the way of giving positive evidence as to the persons voted for, and the impossibility of finding all the voters in the city district, when the population is undergoing a constant change, would present another obstacle in the way, by no means inconsiderable; and your committee do not believe that the evidence of the voters, proposed to be taken, could in any event outweigh the very clear and satisfactory evidence of the tally sheet as to the number of votes actually taken and canvassed.

Your committee conclude, therefore, that, in addition to the votes allowed by the board of county canvassers, Mr. Sherman received in the fourth ward of the city of Newburgh two hundred and sixty-seven votes, Mr. Smith received two hundred and sixty-three votes, and that in the first Assembly district of the county of Orange William C. H. Sherman received, for the office of member of Assembly, three thousand two hundred and thirty (3,230) votes, and that Geo. K. Smith received, for the same office, three thousand two hundred and five (3,205) votes, and that accordingly William C. H. Sherman was duly, and by a majority of twenty-five votes, elected a member of Assembly for said district.

F. H. WOODS.

J. A. SUMNER.

JOHN B. MADDEN.

JAMES LOUGHRAN.

Dated ALBANY, April 15, 1868.

Mr. Pitts, from the minority of said committee, submitted the following report:

To the Assembly:

The undersigned, of the committee on privileges and elections, in the case of George K. Smith, Esq., contesting the seat of Hon. William Sherman, of the first Assembly district of the county of Orange, respectfully dissents from the report of a majority of the committee.

It will be remembered that the contestant filed his petition claiming the seat now held by the sitting member at an early day in the session, alleging among other reasons, that the board of county canvassers had arbitrarily rejected the entire vote of one of the election districts in said Assembly district, thereby unjustly and illegally depriving him of his seat.

The counsel for the contestant raised the question before the committee, that the board of supervisors had no authority to reject the vote of such district, and the committee adjourned to consider and decide such question. The undersigned carefully examined

the law and decisions of the courts bearing upon such question, and came to the conclusion that the certificate of election was wrongfully and illegally awarded to Mr. Sherman, and that the board of county canvassers had no authority to reject the vote of any election district when the returns were regular and valid upon their face.

In this case the said canvassers met, and upon one day allowed the vote of such district, and the next day rejected the same, thereby electing Mr. Sherman in place of Mr. Smith. There is no doubt, as a question of law and justice, Mr. Smith was entitled to the seat in this House, and Mr. Sherman should have been the contestant. The committee never decided this question, but evaded its decision, and directed that the hearing should proceed, and that Mr. Smith must prove his right to the seat by proof other than the returns and the evidence of the voters. The contestant proceeded and introduced a portion of his evidence, and was proceeding to prove that he was legally elected, by swearing the persons who cast their votes for him; and a majority of the committee refused to hear such testimony, and made an order reciting that the case should be confined to proof of what took place at the polls, but that they would not hear the evidence of the voters.

In the case of *Clausen v. Van Brunt*, the sitting member was deprived of his seat by evidence of the voters against the sworn officers who conducted the election; but in this case, the committee refused to hear the very same kind of evidence, upon which they had acted in unseating Mr. Van Brunt, who was a member of this House. In this action of the committee the undersigned could not concur, and its direct effect was to deprive the contestant of the right and privilege accorded to the meanest criminal in the most inferior court of justice, the right of proving his case and having the proof considered.

Upon the proof received, limited as it was by the action of the committee, I do not see how it can be found, as a question of fact, that Mr. Sherman was elected.

Two of the inspectors, who are reputable business men, testify positively that Mr. Smith received a majority in the fourth ward of the city of Newburgh, that being the election district in question; and the other inspector, who was a coarse, vulgar man, and whose evidence was interlarded with oaths and violent language, attempts to swear that Mr. Sherman received the majority. This last impostor, named Thorne, is not entitled to any credit, and I affirm that no intelligent jury would believe him for a moment; and from his manner of testifying, would at once set him down as an unreliable and unworthy man. The remainder of the evidence is about evenly balanced. By every principle of law, the inspectors should be sustained, unless positive proof is introduced showing them guilty of fraud or a mistake. It is extremely dangerous to set aside the election returns upon outside evidence against the sworn testimony of the inspectors.

The evidence in this case satisfies me that Mr. Smith was legally elected, and is entitled to his seat; and he has a reasonable right to complain at the action of the committee in refusing to hear his proof. The precedent established in this House by this committee in the case of Mr. Van Brunt, justifies him in believing his case was to be heard; and when you add to this the positive order of the committee, that he must swear the voters, it forces the conviction upon a candid mind that Mr. Smith has been unfairly treated. I had hoped for the dignity and honor of this House that this case would be decided upon the law and the evidence, but the report of the majority of the committee satisfies me that it is to be disposed of upon partisan grounds. I, therefore, recommend the adoption of the following resolution:

Resolved, That George K. Smith, Esq., was duly elected member of Assembly from the first Assembly district of the county of Orange, at the last general election, and is entitled to the seat now held by Hon. William C. H. Sherman upon this floor.

All of which is respectfully submitted.

EDMUND L. PITTS.

April 22, 1868.

Mr. Pitts moved to substitute the report of the minority for that of the majority.

Mr. Speaker put the question whether the House would agree to said motion, and it was determined in the negative.

Mr. Speaker then put the question whether the House would agree to said majority report and it was determined in the affirmative.

Ayes, 65. Noes, 44.

Assembly Journal, 1868, vol. 2, pages 1240 to 1246.

Case of James McKeever and Charles H. Whalen.

FOURTEENTH DISTRICT, COUNTY OF NEW YORK — PETITION OF
MR. MCKEEVER PRESENTED. . .

ASSEMBLY CHAMBER, *January 6, 1869.*

Mr. Hartman presented the petition of James McKeever, contesting the seat of Charles H. Whalen, in the fourteenth Assembly district of the city of New York, which was referred to the committee on privileges and elections.

Assembly Journal, 1869, vol. 1, page 36.

REPORT OF COMMITTEE ON PRIVILEGES AND ELECTIONS IN FAVOR
OF AWARDING SEAT TO JAMES MCKEEVER.

ASSEMBLY CHAMBER, *March 31, 1869.*

Mr. Hegeman, from the committee on privileges and elections, made a report in the case of the contested seat of Mr. Whalen, as follows:

REPORT OF THE COMMITTEE ON PRIVILEGES AND ELECTIONS, IN
THE MATTER OF THE ELECTION OF CHARLES H. WHALEN, AS
MEMBER OF ASSEMBLY FOR THE FOURTEENTH ASSEMBLY DIS-
TRICT OF THE COUNTY OF NEW YORK, CONTESTED BY JAMES
McKEEVER.

To the Assembly:

The standing committee on privileges and elections, to whom was referred the memorial of James McKeever, claiming that he was entitled to the seat as a member of Assembly from the fourteenth Assembly district in the county of New York, and now occupied by Charles H. Whalen, respectfully report:

That the official canvass of the above named Assembly district gives to Charles H. Whalen two thousand three hundred and five (2,305); to James McKeever, two thousand two hundred and four (2,204); to H. G. Carter, one thousand one hundred and sixty-eight (1,168) votes; that there was one defective, eleven (11) blank, and one hundred and three (103) scattering ballots.

Mr. Whalen's plurality being one hundred and one (101) votes, the certificate of election was awarded to him.

The testimony shows the most extreme irregularities in the manner in which the election and canvass were conducted in several of the precincts of the districts; especially is this true of the thirty-fourth (34) election district, in which, as is clearly shown, the canvass was carried on with the utmost recklessness and with an entire disregard and contempt of the law. Your committee have concluded, therefore, to make the investigation in this district decisive of the case.

The returns in this district give to Mr. Whalen two hundred and sixty-seven votes, Mr. McKeever ninety-three, and Mr. Carter sixteen votes.

The concurring testimony of sixteen witnesses, strongly corroborated by the surrounding circumstances, shows that two of the inspectors in that district, to wit, Bernard McQuade and William Mc-

Kenna, were the friends and supporters of Mr. Whalen, and that repeatedly during the day, each of these inspectors, having at the time charge of the Assembly box, did substitute and put into said Assembly box, ballots, other than those handed to such inspector by the elector.

That when another inspector (Lewis H. Latimer) called attention to, and protested against these fraudulent and dishonest practices, he was threatened, in gross and abusive language, with personal violence, on the part of these associate inspectors.

In addition, it is satisfactorily proven, that, in other instances, offensive and even obscene epithets were used to intimidate voters who declined to cast their ballots for Mr. Whalen.

That others, who insisted upon their rights to take the oath prescribed by law, were violently taken from the polls by persons pretending to act in the capacity of special sheriffs, deputies, with no attempt on the part of the board of inspectors to prevent such violence.

Other irregularities were committed, for a detailed statement of which reference is made to the testimony as reported by the stenographer of the Assembly.

The parties to the contest have been represented by able and experienced counsel; the investigation has been ample, thorough and impartial, and from it your committee come to the following conclusions:

1st. That the election in the fourteenth Assembly district was not such an election as is contemplated by the statute.

2d. That where the testimony specially shows that fraud has been actually committed, and the law willfully and intentionally violated, the whole vote in the district, in which such fraud occurs, is thereby vitiated.

3d. That the election in the said thirty-fourth election district was fraudulent, and, therefore, illegal; and that the vote therein should be rejected, and that the rejection of said vote leaves the result in the fourteenth Assembly district as follows:

For Mr. McKeever, two thousand one hundred and eleven; for Mr. Whalen, two thousand and thirty-eight votes, which will give to Mr. McKeever seventy-three majority in said Assembly district.

Your committee, therefore, recommend the adoption of the following resolution:

Resolved, That James McKeever is the duly elected member of Assembly from the fourteenth Assembly district of the county of New York, and is entitled to the seat now occupied by Charles H. Whalen.

All of which is respectfully submitted.

W. W. HEGEMAN.

N. B. SMITH.

J. H. SELKREG.

W. A. CONANT.

The undersigned, a member of the committee on privileges and elections, dissents from the conclusions of the foregoing report, on the ground that the evidence is not sufficient to warrant the rejection of the votes cast in the thirty-fourth election district.

W. W. MOSELEY.

See papers and testimony accompanying report Assembly Documents, 1869, vol. 9, No. 122, pages 5 to 91.
Assembly Documents, 1869, vol. 9, No. 122.

Which was laid on the table and ordered printed.

Mr. Hegeman moved that said report be made a special order for Friday morning next, immediately after the reading of the Journal.

Mr. Murphy moved to amend by striking out the word "Friday," and inserting "Tuesday."

Mr. Speaker put the question whether the House would agree to the said motion of Mr. Murphy, and it was determined in the negative.

Mr. Speaker then put the question whether the House would agree to said motion of Mr. Hegeman, and it was determined in the

affirmative, two-thirds of all the members present voting in favor thereof.

Assembly Journal, 1869, vol. 1, page 775.

SPECIAL ORDER — CONSIDERATION OF.

April 2, 1869.

Mr. Speaker announced the special order, being the report of the committee on privileges and elections, in the matter of the election of Charles H. Whalen, member of Assembly for the fourteenth Assembly district, of the county of New York, contested by James McKeever.

Mr. Hitchman offered the following resolution, as a substitute for the resolution reported by the majority of the said committee:

Resolved, That Charles H. Whalen is the duly elected member of Assembly from the fourteenth Assembly district, of the county of New York.

Mr. Speaker put the question, whether the House would agree to the substitute offered by Mr. Hitchman, and it was determined in the negative.

Ayes, 23. Noes, 70.

Mr. Speaker then put the question, whether the House would agree to the resolution as reported by a majority of the committee, and it was determined in the affirmative.

Ayes, 72. Noes, 20.

JAMES MCKEEVER DECLARED DULY ELECTED.

James McKeever was then declared the duly elected member of Assembly from the fourteenth Assembly district, of the county of New York, and entitled to the seat now occupied by Charles H. Whalen.

MR. MCKEEVER TAKES THE OATH OF OFFICE.

Whereupon, Mr. McKeever, appeared at the bar of the House, when the constitutional oath of office was administered by the Speaker.

PRIVILEGES OF THE FLOOR EXTENDED TO MR. WHALEN.

Mr. Hartman moved that the privileges of the floor be extended to Mr. Whalen during his stay in this city.

Mr. Speaker put the question, whether the House would agree to the said motion, and it was determined in the affirmative.

Assembly Journal, 1869, vol. 1, pages 813, 814, 815 and 816.

Case of Timothy J. Campbell and Frederick Zimmer.

**EIGHTH DISTRICT, COUNTY OF NEW YORK — PETITION OF
FREDERICK ZIMMER PRESENTED.**

ASSEMBLY CHAMBER, *January 6, 1869.*

Mr. Richmond presented the petition of Frederick Zimmer, claiming the seat of the Hon. Timothy J. Campbell.

Which was referred to the committee on privileges and elections.
Assembly Journal, 1869, vol. 1, page 36.

REPORT OF COMMITTEE IN FAVOR OF MR. CAMPBELL.

ASSEMBLY CHAMBER, *April 2, 1869.*

Mr. N. B. Smith, from the committee on privileges and elections, made a report in the words following:

The committee on privileges and elections, to which was referred the petition of Frederick Zimmer, of the city of New York, praying, for the reasons therein set forth, that he might be declared elected and entitled to a seat in this body, from the eighth Assembly district of the county of New York, in place of the Hon. Timothy J. Campbell, now occupying said seat, do respectfully report:

That the committee, by a resolution, required the contestant to serve upon the sitting member a statement of the facts and allegations upon which he claimed the seat of the sitting member, and that the sitting member serve a similar statement upon the con-

testant, which resolution was complied with by the respective parties, and their statements will be found on pages two and three of the evidence. The allegations of the contestant, which were numerous and comprehensive, required the examination of a large number of witnesses, and from the voluminous evidence taken in this case the following facts and conclusions are submitted: The whole number of votes cast in this Assembly district at the last November election for member of Assembly, was five thousand seven hundred and twenty-one, of which Timothy J. Campbell, by the certificate of the county canvassers, received two thousand six hundred and fifty-five, Frederick Zimmer, two thousand four hundred and sixty-one, Thomas H. Ferris, four hundred and sixty-eight, Henry S. Jennings, seventy-one, and scattering sixty-six, thus electing Mr. Campbell by one hundred and ninety-four votes.

The investigation in this case involved the consideration of two general topics, fraudulent voting or repeating, and fraudulent and illegal canvassing. The first allegation of the contestant is to the effect, that stupendous frauds were practiced throughout this Assembly district by means of non-resident voters and repeaters. A number of witnesses were examined for the contestant to prove that persons were illegally registered in various districts, or voted in the names of other persons who were duly registered. Charles A. Pearsall, Peter Wilmot, Michael Kelly, John H. Deusenbury, Joseph F. Ellery and Patrick W. Hand, severally testified upon this subject. But their testimony, with the exception of the evidence of Messrs. Ellery and Deusenbury, is either unworthy of credence or is too extravagant and indefinite to sustain the allegation. Mr. Deusenbury testified positively (see page 30 of the printed evidence) that there was one illegal vote cast for Mr. Campbell in the eleventh district, where he was inspector, by a non-resident or repeater who assumed the name of Thomas Duffy; and he further testified that twenty or more non-residents were illegally registered in his district, but that none of them voted at that election. Mr. Ellery, who was examined at great length,

testified that seventy-two illegal votes were received in the sixth election district, of which forty-two were cast by non-residents, and thirty by persons who voted in the names of electors duly registered, and that thirty of the non-residents were electioneering for the democratic ticket and working in the interest of Campbell. Mr. Ellery testified with evident fairness and candor, but was wholly unable to specify more than a few names, or to give particulars and sufficient evidence to warrant the rejection of the district, or any definite number of votes. Even if the whole number of fictitious and fraudulent votes, as claimed by the foregoing witnesses, both by positive evidence and mere hearsay, was excluded from the canvass, Mr. Campbell would still have a clear majority. As to the allegations that the ballots for member of Assembly were illegally and fraudulently canvassed, it appears from the testimony of three witnesses sworn in behalf of the contestant, who, shortly after the November election, examined at the station-house, where were stored all the ballot-boxes of this Assembly district, two of the boxes containing the Assembly ballots as they had been assorted into tallies at the official canvass, that these votes appeared to be assorted or twisted into tallies of ten, but they found Zimmer ballots mixed into Campbell tallies from one to five ballots in every tally for Campbell, and some of Campbell's tallies contained but eight or nine ballots, while some of the Zimmer tallies contained twelve or fifteen ballots. This testimony, even if uncontroverted or unimpeached, by the incumbent, is not sufficiently explicit and definite to characterize the whole canvass as fraudulent and illegal, or to sustain a demand for a specific relief by the rejection of any particular district. The burden of proof is with the contestant, who holds the affirmative of the issue. The law presumes that public officers act honestly, and positive evidence is necessary to establish corruption and dishonesty in the conduct of the canvassers and inspectors. To remove this imputation of false counting, and to show that the ballot-boxes must have been tampered with at the station-house, nearly all the canvassers in the fourteen election

districts were examined in behalf of the incumbent, and positively swore to the integrity of their action. In the first election district, which was a strongly republican district, Charles A. Pearsall, the republican inspector, testified (see pages one to eight of evidence) that at the canvass after the ballots for member of Assembly had been turned upon the table, there was a rush made by a crowd of outsiders against the counter, great excitement and confusion ensued, and at that moment Mr. Roberts, the democratic canvasser, threw a handful of tickets upon the pile of uncanvassed ballots. Mr. Holmes, the republican canvasser, and Mr. Roberts, each contradicted this testimony, and testified that they canvassed the ballots honestly and correctly. While the character of Pearsall is so seriously questioned by the testimony of John Tooker, William H. Smith and other impeaching witnesses, that his evidence is not worthy of full credence. During the canvass in the fourth election district a disgraceful and more serious riot and disturbance occurred. It appears, from the testimony of the perpetrators of this ruffianly act, that after the Assembly ballots were emptied out of the box on the table, and before they were counted, the gas-lights were suddenly extinguished, and a pistol was immediately fired off. It is disgraceful that a canvass of ballots should be interrupted by such disorderly and riotous proceedings, and it is especially reprehensible that the perpetrators of such dastardly acts should escape unrebuked and unpunished, and should afterwards boast of their audacious villainy. After the gas was relit, the unopened ballots were put back into the box, and the box was sealed and afterwards sent to the police station. Eight days afterwards, by the direction of the board of supervisors, the inspectors canvassed the votes at the station-house, and returned five hundred and thirty-four for Zimmer, forty-one for Campbell, seventeen for Jennings, and fourteen for Ferris. Evidence was given by the contestant to show, that, during the darkness which ensued after the extinguishment of the gas, a handful of tickets was thrown upon the table. But the evidence on this subject is so indefinite that it is uncertain how

the fraudulent tickets became mixed with the ballots, and we do not feel warranted in excluding or throwing out the votes of this district from the official returns. It was admitted that all the votes canvassed for Campbell and the other candidates were polled for them. In the seventh election district the contestant attempted to prove that the election returns were erroneous and false. The election returns showed three hundred and twenty-one votes for Campbell, and seventy-five for Zimmer. Eighty-eight witnesses were examined by the committee, who severally testified that they voted for Zimmer; but the testimony of at least fifteen of this number is too indistinct and contradictory to be accepted as proof of their votes. It was evident, however, from the testimony upon this subject, that cunning and designing men were working in the interest of Campbell, imposed upon these unsophisticated laboring men, and induced some of them to accept of and vote Campbell tickets by persuading them that they were Zimmer tickets. But there is no evidence that any violence or threats were used to affect or interfere with the voting. McKinnon, the democratic inspector in that district, was conclusively proven to be a dishonest and unscrupulous man, whose reputation was that of a stuffer of ballot-boxes; but there is no evidence, except in one instance, that he perpetrated or attempted to perpetrate the fraudulent substitution of a ballot. There was also slight evidence of other irregularities in that district; but the whole evidence upon this subject is not sufficient, we think, to throw out and exclude the district from the canvass. In the eighth election district a row was excited at the instant the Assembly ballots had been emptied upon the table, and during the confusion which ensued some ballots were swept upon the floor. After they had been replaced and counted, it was discovered that forty-six votes had been cast in excess of the poll list. The evidence is not sufficiently positive and explicit to show in whose interest this riotous proceeding was instigated, or to whose advantage in counting it inured. But the conduct of Brady, the democratic canvasser in that district, was especially reprehensible,

since he attemptedly repeatedly to bribe the republican canvasser, and testified that the votes were honestly and correctly canvassed.

From the above findings it is apparent that the incumbent, Timothy J. Campbell, was duly elected member of Assembly from the sixth Assembly district of the county of New York at the last general election by a clear majority, and we are, therefore, of the opinion that he is entitled to retain his seat in this body. We, therefore, recommend the adoption of the following resolution:

Resolved, That Timothy J. Campbell was duly elected a member of Assembly from the sixth Assembly district of the county of New York, at the last general election held on the 3d of November, 1868, and that he is entitled to the seat in the Assembly now occupied by him.

W. W. HEGEMAN.

N. B. SMITH.

W. A. CONANT.

J. H. SELKREG.

WM. W. MOSELEY.

Mr. N. B. Smith moved that the report of said committee be printed, and made a special order for Wednesday next, immediately after the reading of the Journal.

Mr. Speaker put the question whether the House would agree to said motion, and it was determined in the negative; two-thirds of all the members present not voting in favor thereof.

REPORT ADOPTED — MR. CAMPBELL AWARDED THE SEAT.

Mr. Hitchman moved that the report of the committee be adopted.

Mr. Speaker put the question whether the House would agree to said motion, and it was determined in the affirmative.

Assembly Journal, 1869, vol. 1, pages 816, 817, 818 and 819.

Case of Alexander McLeod and William Halpine.

THIRTEENTH DISTRICT, COUNTY OF NEW YORK — PETITION
PRESENTED.

IN ASSEMBLY, *January 6, 1869.*

Mr. Richmond presented the petition of Alexander McLeod, claiming the seat of the Hon. William Halpine.

Which was referred to the committee on privileges and elections.
Assembly Journal, 1869, vol. 1, page 36.

MAJORITY REPORT OF COMMITTEE ON PRIVILEGES AND ELECTIONS.

ASSEMBLY CHAMBER, *April 22, 1869.*

By unanimous consent, Mr. Hegeman, from the committee on privileges and elections, submitted a report on the contested seat of Mr. Halpine, as follows:

**REPORT OF THE COMMITTEE ON PRIVILEGES AND ELECTIONS IN
THE MATTER OF THE ELECTION OF WM. HALPINE, AS MEMBER
OF ASSEMBLY FROM THE THIRTEENTH ASSEMBLY DISTRICT,
CONTESTED BY ALEXANDER MCLEOD.**

To the Assembly:

The standing committee on privileges and elections, to whom was referred the petition of Alexander McLeod, claiming the seat as member of Assembly, from the thirteenth Assembly district, in the city and county of New York, now occupied by Wm. Halpine, respectfully report:

That, owing to the large number of witnesses, the difficulty, as well as the expense of procuring their attendance at the Capitol, the nature of the record proofs, which could not be withdrawn from the county clerk's office of the county of New York, to which constant access was necessary, compelled your committee to conduct the investigation in this case in the city of New York, and that, during the progress of this protracted examination, both the contestant and incumbent were in attendance, personally, and by able and experienced counsel.

The Assembly district in question is the thirteenth of the city of New York, embracing nearly all the sixteenth ward.

The intense interest manifested by the press and the partisan friends of the parties to the contest, was seen in the large attendance at the sittings of your committee.

The investigation, as it progressed, developed the cause of this wide-felt interest, and showed that the sixteenth ward of the city was the chief center from which the election frauds of the city and county radiated. Judge John H. McCunn of the superior court of the city, and his brother-in-law, clerk of the above court, reside in this ward from which so many reputed fraudulent naturalization papers were issued during the canvass of the last general election. In this ward, also, lives the notorious Henry Lile, a self-condemned fraudulent naturalization broker, the notorious Peter Burke, Patrick McCaffrey, Scip and Rosenberg. It is here, too, that the "Nineteenth street gang" of bruisers and "repeaters" have their headquarters, together with the naturalization mills of McMann, Beglan and Scip.

The duty owed to the people of this State, the question of the purity of the ballot-box, and the necessity of further safeguards for its protection, justice to the parties in the case, all demanded that your committee should give to this contest the most thorough examination consistent with their other duties as members of this House.

The inability of the contestant to procure official documents on file in the office of the county clerk, the board of supervisors, and other places where election records are kept, induced him to abandon all other points and specifications, and to confine himself to the three following:

1st. The exclusion and disallowance of the vote in the seventeenth election district of this Assembly district, on the ground that there was *no canvass* of the votes in that district; that the number of ballots were estimated — guessed at — not counted, and that there were other informalities and irregularities.

2d. That the incumbent had cast and counted for him a large

number of illegal ballots, by a class of persons known as "repeaters," whereby several hundred illegal ballots were allowed him in the official canvass and estimate of the votes cast.

3d. That the incumbent had cast for him and counted a large number of illegal ballots by persons voting and repeating on fraudulent naturalization papers whereby several hundred illegal ballots were allowed him in the official canvass and estimate of the votes cast.

To give a clear idea of the sufficiency of the evidence by which the contestant has sought to establish the grounds upon which he claims his seat, it must be observed that there were three candidates nominated and voted for in the district, viz., Wm. Halpine (Tammany democrat), Ashael R. Herrick (union democrat), and Alexander McLeod (republican).

The canvassers awarded Mr. Halpine	2,921
The canvassers awarded Mr. McLeod	2,731
The canvassers awarded Mr. Herrick	1,068
Scattering, blank, and defective	101

Thus giving to the sitting member over the contestant a plurality of one hundred and ninety votes.

It was, therefore, necessary that the contestant should show, under the three points named, that the sitting member should be disallowed more than that number of votes awarded by him by the official canvass.

At the time the canvass was made, a democratic canvasser of the seventeenth district had a bet or wager pending in the interest of the incumbent to the amount of \$500, deposited in the hands of a stakeholder upon the result in said seventeenth district. That this canvasser, uniting with the other canvassers in assorting the Assembly ballots after they were taken from the box, placed such as he pleased on a certain file or wire appointed for Mr. Halpine's votes, and the others he placed, or assisted in placing, on the wires designated for the ballots of the other candidates, McLeod and Herrick, respectively.

After this he assisted in counting McLeod's and Herrick's ballots, which he added together, and the sum of their ballots was then subtracted from the whole number of ballots cast, and the remainder allowed to Mr. Halpine, without counting them; thus was every rule or requirement of canvassing votes disregarded; for,

1st. Mr. Halpine was allowed the benefit of "blanks, defective and scattering ballots," of which there was a large number cast.

2. The associate canvasser never examined the ballots, which the interested canvasser placed on Mr. Halpine's wire, to see if none of McLeod's or Herrick's ballots had not been placed there; nor did he count them.

There were also other irregularities. It was found that the number of ballots taken from the box exceeded that of the poll list, and McLeod's ballots were destroyed to make them correspond.

This interested canvasser also, after he had announced the result of the canvass made, as stated, destroyed, against the protest of the bystanders and of his associate, the Assembly ballots, though he had carefully gathered up and redeposited, in their respective boxes, the ballots, after counting them, of the other officers.

The interest of this canvass, adverse to the contestants, and the manner in which the pretended counting of the ballots was made, and the disposition made of the other ballots, forces the conclusion that he destroyed the Assembly ballots in order to cover and to make a fraudulent canvass of the Assembly votes.

Your committee, therefore, think that the contestant has conclusively shown that there was no canvass of the Assembly ballots in this seventeenth district—that they were estimated, not counted, and that, too, under circumstances that render the inference of fraud conclusive, and that the Assembly vote in this district should be rejected.

2d. The evidence of illegal voting, by repeaters, in this Assembly district, at the last general election, is overwhelming. It is conclusively shown, by the testimony of numerous witnesses examined by your committee, that gangs of these repeaters, on the day of election, were traveling from polling place to polling place, and

many of them are proven to have voted. These repeaters are shown to have come from adjoining districts, in gangs of twenty-five or thirty, prepared with lists of names and residences furnished by their leaders, on which to vote, and are shown to have voted from one to eight times each in this district. At one polling place, thirteen of these, identified by a republican challenger as residing in a distant part of the city, were allowed to vote, unchallenged, for fear of personal violence. Twenty-three of these repeaters appeared before the committee and testified to the casting, by them, of eighty-two ballots in the aggregate for the sitting member.

The fact that there are seventeen polling places in this district will give some idea of the facilities afforded for the operations of repeaters, some of whom swear that they voted three times each at the same polling place.

One witness testified that he saw twenty-five or thirty of them start out to vote from one house, and saw their lists of over two hundred names and residences, from which they voted; saw them when they returned, and heard them state the places they had voted in the sixteenth ward.

A captain of the police, whose precinct is in the sixteenth ward, testified that the Nineteenth street gang were many of them personally known to him; that they were professional thieves, burglars, pickpockets and highway robbers; that they were repeaters acting in the interest of the democratic party at elections. It is shown that they were employed by, and used their influence in favor of, the "straight democratic ticket."

The contestant appeared as a witness and testified that neither by direct or indirect means did he employ any of these repeaters in any manner whatever to vote or testify, or in any way to aid his election.

The sitting member, from the respect due to his position, was not examined by your committee in reference to the matter of repeating, though he testified as to other matters.

The fact that the civil magistrates of the city of New York are elected by the dominant party, that this practice of repeating by

these violent characters has been reduced to a system, and that it is a crime winked at by those whose business it is to arrest it, becomes at this time a matter of the gravest concern to the people of this State. Several of these repeaters appeared a second time before your committee, retracting their former testimony and stated that they did so under the threat of a prominent official, that, in case they refused so to retract, they would be sent to the State prison.

The leader of this gang of repeaters, after testifying on the part of the contestant, was arrested at the instance of the partisans and friends of the incumbent and incarcerated in the "Tombs." He was subsequently produced as a witness for the incumbent under the custody of officers from the "Tombs" and reiterated his former testimony and was dismissed to the custody of the officers, was recalled after the lapse of a few minutes by the incumbent, and testified that the other repeaters were bribed by him to swear falsely in favor of the contestant, but still asserting the truth of his first testimony as before. Again he was recalled by the incumbent, but it being apparent to your committee that improper influences were being resorted to, they declined to have him testify further. This witness and leader of these repeaters was subsequently released on bail, given by some person unknown to the witness.

Evidence precisely similar to the above was given by others of the gang, all protesting that they retracted through fear. The manner in which these retractions were made forces the conclusion that there is a political power in the city of New York, of sufficient strength and influence to grant immunity from punishment of offenses of this class.

3d. Your committee have examined with care the matter of fraudulent naturalizations, and, to that end, requested the county clerk of New York to furnish a list of names and residences of persons naturalized in this district during the three months prior to the last general election. The request was denied, on the ground that the records had become disarranged by the clerks of the Congressional committee.

The fact that, during this period, twenty-eight thousand naturalization papers were issued, many under circumstances, to say the least, suspicious, and that access to these papers was denied, upon a reason which appeared insufficient, makes a strong presumption of fraud.

By the aid of the clerks of the Congressional committee, the names and residences of one thousand eight hundred of these twenty-eight thousand naturalized papers were obtained. One hundred and one were issued to this Assembly district, and of the one hundred and one, fifty were proven to be fraudulent, and on these fraudulent papers it is admitted that twenty-seven votes were cast in this district; eighteen per cent. of the papers examined were issued to persons residing or giving names as residents of the district; five thousand naturalization papers were issued to the district, and, by the above estimate, the conclusion is inevitable, that a large proportion were illegal and fraudulent.

It is in evidence that these fraudulent papers were bought openly, and distributed by members of the dominant party in New York, through its agency and in its interest.

It thus appears from this source alone that the incumbent holds his place in the Assembly by virtue of votes cast by repeaters, and by those who voted on these fraudulent papers, and your committee further state that the evidence fully warrants the statement in figures, as follows:

Professional repeaters	80
Other repeaters and votes cast by non-residents.....	55
Seventeenth district rejected	78
Fraudulent papers voted on out of the one hundred and one examined	27
	<hr/>
	240
Halpine's majority	190
	<hr/>
McLeod's majority	50
	<hr/>

Your committee, therefore, conclude that the incumbent is not entitled to the seat he occupies in this House, not being elected thereto by the legal voters of his district, and they respectfully recommend the adoption of the following resolution:

Resolved, That Alexander McLeod is the duly elected member of Assembly from the thirteenth Assembly district of the city of New York, and that he is entitled to the seat now occupied by William Halpine.

All of which is respectfully submitted.

W. W. HEGEMAN.

N. B. SMITH.

W. A. CONANT.

J. H. SELKREG.

See testimony accompanying report, pages 1 to 387 inclusive. Assembly Documents, 1869, vol. 9, No. 139.

Which was laid on the table and ordered printed immediately.

MINORITY REPORT PRESENTED.

ASSEMBLY CHAMBER, *April 23*, 1869.

Mr. Moseley, from the committee on privileges and elections, presented a minority report in the case of the contested seat of Mr. Halpine, as follows:

MINORITY REPORT OF THE COMMITTEE ON PRIVILEGES AND ELECTIONS, IN THE MATTER OF THE ELECTION OF WM. HALPINE AS MEMBER OF ASSEMBLY FROM THE THIRTEENTH ASSEMBLY DISTRICT OF NEW YORK CITY, CONTESTED BY ALEXANDER MCLEOD.

To the Assembly:

The undersigned, a minority of the committee on privileges and election, respectfully reports that he is unable to concur either in the statements or in the conclusion of the majority. Some of these statements are so utterly wanting in proof to sustain them,

or are so widely variant from the testimony taken, that the majority, finding it impossible at this late period of the session to read the testimony, must have accepted the extravagant and unwarranted assertions of the contestant's counsel as facts. They are thus committed to many allegations that they would scarcely have made upon a more thorough examination of the case.

It should be borne in mind, in the consideration of this case, that the incumbent has not had a full and equal opportunity to present his testimony. The testimony for the contestant was not concluded until the 22d of March, and the other duties then pressing upon the members of the committee were so numerous that they closed the testimony for the incumbent against his earnest remonstrance notwithstanding he had yet a large number of witnesses, and had only had between two and three days for examination of his witnesses. During that short time, however, Mr. Halpine examined over one hundred and fifty witnesses, and he was proceeding, when thus cut short, not only to show the falsity of the vague and ridiculous testimony of the contestant, but to demonstrate in the most conclusive manner the fairness of his own election.

Considerable testimony was taken in respect to the canvass of the votes in the seventeenth election district. No fraud whatever was shown, but the majority are warranted, by the weight of evidence, in finding that the canvass in that district was not made in the manner required by law. If the vote of a district may be thrown out, for mere omissions and irregularities, without any proof of intentional wrong, then the return, from the district may be rejected. Its rejection, however, would not control the final result. That district gave Mr. Halpine seventy-eight majority, and if it were excluded he would still have one hundred and twelve majority.

It is proved that one person, who slept in an adjoining district, registered and voted for Mr. Halpine from the stable at which he worked, but that he did not vote from any other place.

One young man swore that he was then under age, but that he voted for Mr. Halpine. Three cases were presented of persons who voted, in respect to whose naturalization objections, not very well founded, were made.

These are all the cases in which there is any proof whatever of fraud or wrong. The weakness of the contestant's case, could alone have induced the majority to such an unheard of cause as objecting to Mr. Halpine's election, because certain persons who are named, are said to reside in his district though some of them were not proved to be residents. If the objection were reasonable, it would be equally tenable against Mr. McLeod; and, if the majority report were sustained, the evidence of these persons would, nevertheless, remain unchanged.

The most important witnesses for the contestant, who had been hired to testify at from five to ten dollars each, were recalled as witnesses and swore that their previous testimony was false.

Surely all that such men may say amounts to no more than if their testimony was not in the case. If the returns from the seventeenth district were rejected, and every vote were thrown out whether proved or not, to have been for Mr. Halpine, in which it is shown that there was any doubt of the right to vote, Mr. Halpine would yet have one hundred majority. The undersigned therefore recommend the adoption of the following resolution:

Resolved, That Alexander McLeod is not entitled to the office of member of Assembly from the thirteenth Assembly district of the city of New York, now held by Hon. William Halpine.

All of which is respectfully submitted.

WILLIAM W. MOSELEY.

Assembly Document, 1869, vol. 10, No. 188.

Which was laid on the table and ordered printed.

Assembly Journal, 1869, vol. 2, page 1440.

REPORTS CONSIDERED.

ASSEMBLY CHAMBER, *April 23, 1869.*

Mr. Hegeman called for the consideration of the report of the committee on privileges and elections in the case of the contested seat of William Halpine.

Mr. Hitchman raised the point of order, that the House being in the order of the third reading of bills, under the ninth joint rule, the consideration of said report required unanimous consent.

Mr. Speaker decided the point of order not well taken, it being a privileged report.

The question being on the adoption of the report.

Mr. Kiernan moved to lay said report on the table.

Mr. Speaker but the question, whether the House would agree to the said motion, and it was determined in the negative. Ayes, 52. Noes, 61.

Debate arising.

Mr. Husted moved the previous question.

Mr. Speaker having decided that he had recognized Mr. Husted,

Mr. Hitchman appealed from the decision of the chair.

Mr. Speaker put the question, "Shall the decision of the chair stand as the judgment of the House?" and it was determined in the affirmative. Ayes, 65. Noes, 3.

Mr. Speaker then put the question, "Shall the main question be now put?" and it was determined in the affirmative.

Mr. Speaker put the question, whether the House would agree to said report, and it was determined in the affirmative.

Ayes, 66. Noes, 4.

MR. MCLEOD DECLARED ENTITLED TO HIS SEAT.

Mr. Alexander McLeod was then declared entitled to the seat occupied by William Halpine, from the thirteenth Assembly district of New York.

The hour of two o'clock having arrived, the House took a recess until four o'clock P. M.

Four o'clock P. M., the House again met.

MR. MCLEOD TAKES THE OATH OF OFFICE.

Mr. Alexander McLeod appeared at the bar of the House and took the constitutional oath of office as member of Assembly. Assembly Journal, 1869, vol. 2, pages 1460 to 1466.

Case of Willett N. Hawkins and John Decker.

**RICHMOND COUNTY — PETITION OF WILLETT N. HAWKINS
PRESENTED.**

ASSEMBLY CHAMBER, *January 6, 1869.*

Mr. Davis presented the petition of Willett N. Hawkins, contesting the seat of the Hon. John Decker.

Which was referred to the committee on privileges and elections.

Assembly Journal, 1869, page 36.

**REPORT OF MAJORITY OF COMMITTEE IN FAVOR OF MR.
HAWKINS.**

ASSEMBLY CHAMBER, *April 7, 1869.*

Mr. Hegeman, from the committee on privileges and elections, presented a report in the case of the contested seat of John Decker, as follows:

**REPORT OF THE COMMITTEE ON PRIVILEGES AND ELECTIONS, IN
THE MATTER OF THE ELECTION OF JOHN DECKER AS MEMBER
OF ASSEMBLY FOR THE COUNTY OF RICHMOND IN THE STATE OF
NEW YORK, CONTESTED BY WILLETT N. HAWKINS.**

To the Assembly:

The standing committee on privileges and elections, to whom was referred the memorial of Willett N. Hawkins, claiming the

seat of member of Assembly from the county of Richmond, now occupied by John Decker, respectfully report:

That they have examined with great care the testimony taken on the part of the contestant, Hawkins, before the Hon. C. B. Metcalf, county judge of Richmond county, and certified to the clerk of the Assembly in compliance with the statute; that at length and with equal care, they have taken the additional evidence adduced by the parties, and have heard the arguments and examined the points of the counsel on both sides.

The difficulties arising in the case, arising from the remoteness of the district, and the extreme unwillingness of witnesses, in many cases, to come to New York, have been overcome by an examination of many of these at different points on Staten Island by your committee during the recess of the Legislature.

Three candidates presented themselves for member of Assembly in the contested district, with the following result, as certified by the board of county canvassers:

For Samuel Marsh, Jr., one thousand one hundred and nineteen; for John Decker, two thousand and eighty; and for Willett N. Hawkins, two thousand and forty-seven votes, giving Mr. Decker a majority of thirty-three votes, and upon which the certificate of election was awarded.

The evidences of irregularities and informalities throughout the district, are positive and numerous — irregularities arising in part from gross ignorance on the part of inspectors, and partly from misapprehension of, and an intentional violation of the law, in the preparation of the registers.

In the second district of Castleton the registry was reopened after it had been legally closed at the proper time.

In the first district of Northfield the inspectors sat, not alone on a day other than that provided by law, but the posted registry was torn down and another substituted in its place. Six persons were permitted to vote, also, who were not registered.

In the third district of Northfield seventeen persons unregistered were allowed to vote.

In the first district of Middletown the registers sat on Monday, November 2.

The above-named districts are each parts of an incorporated district.

Similar irregularities and violations of law occurred in the first and second districts of Westfield, but neither being parts of an incorporated district, they come under the law of 1859, which is directory and not mandatory in its provisions.

Your committee are fully impressed with the belief that something should be done immediately in the way of legislation to prevent the recurrence of irregularities, so general as are these throughout a whole Assembly district, and that it is a matter of the gravest concern to the people of this State, that additional safeguards be thrown around the ballot-box to protect it from fraud and ignorance.

While your committee are clearly of opinion, that upon a strict construction of the law, the vote in four of the above-named districts could be rejected they have reached their final conclusion in the case, through a careful investigation of the legality of the election in the second district of Middletown.

In this district eighty-seven votes were cast by persons whose names were on the poll-list but *not* on the register. About fifty-two of these illegal votes were cast for Mr. Decker, and about twelve for Mr. Hawkins, leaving from this view of the case, forty ballots to be deducted from Mr. Decker's vote; a number more than sufficient to elect Mr. Hawkins. A careful comparison of names, however, discovers a slight similarity in the sound and spelling of a portion of those on the poll list and registry, and your committee concluded to give Mr. Decker the benefit of the legal doubt, as to the character of these ballots, and to decide the case upon the legality of the registry itself, in this second district of Middletown.

The law of 1865 as amended in 1866, and under which the vote in the district must be judged, requires that "a register shall contain a list of the persons entitled to vote, alphabetically arranged by *surnames at full length*, and that in cities and incorporated villages, the *residence* also of the voter, by the number of the dwelling, or other location of such voter; that four copies shall be made out, and that *each copy with the register shall be certified* to be a true list of the votes in the district."

The days upon which the registry is to be made up are fixed by law, and the sitting of the boards on those days is imperative.

The facts, as shown by evidence uncontradicted, are as follows:

1. That in this second district of Middletown, the *inspectors fixed the days* and the registering of names *to suit their own convenience* in utter disregard of the law, to wit, that they sat on Tuesday and Wednesday, October 13 and 14, on Saturday, October 31 and November 2.

2. That this so-called registry, filed in the office of the town clerk, consists of a book containing a list of names. It contains *not the residence* of a single voter in the district. It is not *certified*. It is simply a *list of names*, and in the absence of oral and explaining testimony, it would be impossible to determine its real character. It contains no stamp of official authority; not a word or mark on its face gives any indication that it was intended to be a register. It was made in utter and willful ignorance of the law it has no validity, and can, in no legal sense, be called or deemed a register, such as the law requires.

Your committee, therefore, on a careful, thorough and impartial review of the case, have rejected the whole vote in the second district of Middletown, and have decided that Willett N. Hawkins is the duly elected member of Assembly from the county of Richmond, and recommend the adoption of the following resolution:

Resolved, That Willett N. Hawkins is the duly elected member of Assembly for the county of Richmond, and is entitled to the seat now occupied by John Decker.

All of which is respectfully submitted.

WILLIAM W. HEGEMAN.

W. A. CONANT.

NATHAN B. SMITH.

J. H. SELKREG.

See testimony following report, pages 1 to 124, inclusive.
Assembly Document, vol. 7, 1869, No. 103.

Which was laid on the table and ordered printed.

REPORT OF MINORITY OF COMMITTEE IN FAVOR OF MR. DECKER.

Mr. Moseley, from the minority of the committee on privileges and elections, presented a minority report, as follows:

MINORITY REPORT FROM THE COMMITTEE ON PRIVILEGES AND ELECTIONS IN THE CASE OF WILLETT N. HAWKINS, CONTESTANT, AGAINST HON. JOHN DECKER, INCUMBENT.

The undersigned dissents from the report of the majority of the committee on privileges and elections declaring Willett N. Hawkins entitled to the seat from the county of Richmond now held by Hon. John Decker. No case has been proved upon which such action can justly be founded. After a thorough scrutiny of the election in that county, in which the contestant has been afforded, by a committee controlled by his political friends, every facility that any man could desire, he has only been able to prove that one person, a man by the name of Driscoll, who had been absent from the State, voted for Mr. Decker, in respect to whose right to vote in that county there was any doubt whatever. A few electors, who had not been duly registered, voted at the election and some for each candidate; but if every vote cast by persons in respect to whose right to vote at that election the slightest doubt

could be raised were stricken from the poll, Mr. Decker would yet be elected. It is, therefore, found by the majority necessary to throw out the vote of the second district of Middletown which gave sixty-four majority for Decker. Why? Is any fraud shown? Not the slightest. Every impostor of the election in that district as they have testified themselves voted against Mr. Decker; as they had no motive to do anything to aid his election. The contestant began his case by disputing the votes given by eighty-seven persons in that district whom his counsel stigmatized as "bogus." This was his main point. Mr. Decker brought nearly all of the eighty-seven personally before the committee and proved that they voted some for him and some for each of other two candidates. The eighty-seven included some of the oldest, most respectable and best known residents of the village of Edgewater. All but two were legal voters of that election district, and of the two one who voted for Mr. Decker had moved into an adjoining town before the election, and the other who voted for Mr. Marsh was a soldier entitled to immediate naturalization papers. The attack upon these eighty-seven voters was a disgraceful failure.

It appears that a few persons, not duly registered; voted; and that each of the three candidates received some of these votes. What then? The registry law of 1835 declares (section 6) that "any vote" received from an unregistered person, "shall be void; and shall be rejected from the count, in any legislative or judicial scrutiny into any result of the election." The vote of the individual, not that of the whole district, is to be rejected. This provision, the same section, further declares, "shall be taken and held as mandatory and not as directory." Will the Assembly defy the law that the two Houses have deliberately enacted? Is it so important to unseat Mr. Decker that the Assembly should set so bad an example of law-breaking?

It also appeared that the inspectors in that district held a session and registered a few votes on the Monday next before the election. Surely, the voters registered on that day were, at the most, unregis-

tered voters. It was not a crime for an elector to have his name put down on an unauthorized day. He was either registered then or he was not. If he was registered no objection can be taken to his vote. If he was not registered then his vote must be disposed of in the way the law provides in respect to the votes of unregistered persons. In the first election district of Westfield which gave eighty-seven majority for Hawkins, the inspectors not only sat on the Friday next before the election, but, as is proved by one of them, they added to the registry on that day the names of over fifty persons who did not appear before them. As Tottenville, which is included in that district, is not yet incorporated, the registry law of 1859 applies to the district, and it was just as illegal to register then, under that law on the 30th of October, as it was to register in the Edgewater district, under the law of 1865, on the 2d of November. One law is just as binding as the other, except that the sixth section, and that in fact only of the law of 1865, is declared to be mandatory.

If, therefore, the Middletown district, is to be thrown out for registering on an unauthorized day, the Westfield district should also be thrown out. That would increase Mr. Decker's majority. Will the Assembly throw out one district because it is democratic, and refuse to throw out others to which precisely the same objection applies, because it is republican? Some other unimportant objections are made to the registry in the second district of Middletown. The copy of the registry, put in evidence by the contestant, does not state the residences of the voters, but the registry law of 1865 is not imperative in requiring such statement to be made, except in cities. Neither does the law require any heading to be made in the registry. The contestant carefully omitted to put the original registry in evidence. If he had produced it perhaps his case would have been even weaker than it is. There is no doubt that the book produced by him is substantially a copy of the registry of the district. It has been treated as such throughout the whole of the investigation. As the validity of the copy has not been

questioned, the technical objections made to it are merely captious, and present no reason for disfranchising voters in that district.

The seats of half the members of the Assembly could probably be disputed on as good grounds as are presented against Mr. Decker; such merely technical objections can always be made. They have never heretofore been tolerated. Is it wise to permit them now? The contestant and his counsel have made no secret of the fact that they rely, not upon their case, but upon the majority possessed by their political friends.

This is the whole truth. If the politics of the parties were reversed, the case presented now by the contestant would be simply a subject of ridicule. Will the precedent now be set of throwing out an incumbent, clearly elected, and the undoubted choice of his district, in the entire absence of frauds, and only upon irregularities of the most trivial character? It is unworthy the character of the Assembly and of the State. There will be other elections to take place and other legislators will meet, and no good citizen can view, without regret, the establishment of such a precedent.

The undersigned respectfully recommends the adoption of the following resolution:

Resolved, That the petition of Willett N. Hawkins to be admitted to the seat now occupied by Hon. John Decker, be denied.

All of which is respectfully submitted.

WILLIAM W. MOSELEY.

Assembly Document, 1869, vol. 10, No. 144.

Mr. Hitchman moved that said report be made a special order for Tuesday morning, immediately after reading of the Journal.

Mr. Speaker put the question, whether the House would agree to the said motion of Mr. Hitchman, and it was determined in the affirmative, two-thirds of all the members present voting in favor thereof.

Assembly Journal, 1869, vol. 1, page 910.

CONSIDERATION OF REPORT POSTPONED.

ASSEMBLY CHAMBER, *April 13, 1869.*

Mr. Speaker announced the special order being the majority and minority reports in the case of Willett N. Hawkins, claiming the seat of member of Assembly, now occupied by John Decker.

Mr. Hitchman moved the adoption of the minority report.

Mr. Speaker put the question, whether the House would agree to said motion and it was determined in the negative.

Ayes, 56; Noes, 56.

Mr. Hitchman moved that the consideration of the majority report be postponed for one week:

Mr. Speaker put the question, whether the House would agree to said motion and it was determined in the affirmative.

Assembly Journal, 1848, pages 1061 to 1067.

CONSIDERATION OF REPORTS RESUMED.

ASSEMBLY CHAMBER, *April 27, 1869.*

Mr. Hegeman rose to a question of privilege, and moved that the majority report of the committee on privileges and elections, in the case of Willett N. Hawkins, claiming the seat occupied by John Decker, be now adopted.

And upon that motion he moved the previous question.

Mr. Jacobs raised the point of order, that the report could not now be considered, except by unanimous consent.

The Speaker decided the point of order not well taken, the report being a privileged report.

Mr. Jacobs appealed from the decision of the chair.

Pending the question,

On motion of Mr. Jacobs, the House took a recess until four o'clock, P. M.

FOUR O'CLOCK, P. M.

The House again met.

The question being upon the appeal of Mr. Jacobs from the decision of the chair, the appeal was withdrawn by Mr. Jacobs.

The motion for the previous question was withdrawn by Mr. Hegeman.

Mr. Burns moved that the consideration of the report be postponed one week.

Mr. Speaker put the question whether the House would agree to the said motion, and it was determined in the negative.

Ayes, 48. Noes, 58.

REPORT OF MAJORITY ADOPTED — WILLETT N. HAWKINS
AWARDED SEAT.

Mr. La Bau moved that said report be adopted, and on that motion moved the previous question.

Mr. Speaker put the question, "Shall the main question be now put?" and it was determined in the affirmative.

Mr. Speaker put the question whether the House would agree to said report, and it was determined in the affirmative.

Ayes, 66. Noes, 47.

WILLETT N. HAWKINS DECLARED DULY ELECTED.

Willett N. Hawkins was then declared the duly elected member of Assembly from the county of Richmond, and entitled to the seat now occupied by John Decker, who thereupon appeared at the bar of the House, when the constitutional oath was administered by the Speaker.

PRIVILEGES OF THE FLOOR EXTENDED TO MR. DECKER.

Mr. Hegeman moved that the privileges of the floor be extended to Mr. Decker during the remainder of the session.

Mr. Speaker put the question whether the House would agree to said motion, and it was determined in the affirmative.

Assembly Journal, 1869, vol. 2, pages 1578, 1579, 1580 and 1581.

Case of Wm. C. Jones and Wm. W. Goodrich.

KINGS COUNTY, FIFTH DISTRICT — PETITION PRESENTED.

ASSEMBLY CHAMBER, *January 4, 1870.*

By Mr. Alvord.

Petition of Wm. W. Goodrich, for the seat held by Wm. C. Jones as member of Assembly from the fifth district, of Kings county.

Referred to committee on privileges and elections.

Assembly Journal, 1870, page 11.

See page 802, Assembly Journal, 1870.

REPORT OF COMMITTEE.

ASSEMBLY CHAMBER, *April 26, 1870.*

Mr. Nelson, from the committee on privileges and elections, to which was referred the petition of W. W. Goodrich, claiming the seat now occupied by Hon. Wm. C. Jones, reported in writing and adversely thereto, as follows:

PAPERS AND TESTIMONY IN THE MATTER OF THE CONTESTED ELECTION BETWEEN WILLIAM W. GOODRICH AND WILLIAM C. JONES, IN THE FIFTH ASSEMBLY DISTRICT, KINGS COUNTY.

To the House of Assembly of the State of New York:

The committee on privileges and elections, to which was referred the petition of Wm. W. Goodrich, claiming the seat now occupied by Wm. C. Jones, as representative from the fifth Assembly district of Kings county, respectfully report that the committee have heard the proofs and allegations of the respective claimants, and the arguments of counsel, and the facts of the case, as agreed upon, are as follows:

The whole number of votes cast in the fifth Assembly district was 5,338.

Of which number the Hon. Wm. C. Jones received..... 2,674
 And the Hon. Wm. W. Goodrich received..... 2,664

Giving a majority to the Hon. Wm. C. Jones of.... 10

as declared by the board of county canvassers.

It is claimed on the part of Mr. Goodrich, that to make up the apparent majority of ten allowed to Mr. Jones by the county canvassers, there were frauds committed in the third election district of the twentieth ward, by which the contestant lost thirty-four votes, he having been allowed but one hundred and fifty votes by the inspectors of election in that district, and having since obtained the affidavits of one hundred and eighty-four voters in said district, who testify that they cast their ballots for the contestant.

That upon a careful and thorough examination of the affidavits in the case your committee have come to the conclusion that a large portion of the affidavits upon which Mr. Goodrich rests his claim are entirely unreliable, and should not be admitted as evidence. Your committee append the names of the persons making affidavits not sufficiently explicit to be relied on.

1. Charles Hall don't recollect for whom he voted for Prison inspector, judges, Comptroller or Secretary of State, or mayor; and recollects his vote on Assembly only, because of a gentleman coming to his house and asking him to sign an affidavit.

2. J. B. Bogart voted the regular ticket; voted for Governor (no Governor elected last fall).

3. William G. Williams don't know whom he voted for, for any State officer or for mayor.

4. Warrington B. Williams don't know whom he voted for, for any State officer, for Governor, for Lieutenant-Governor, for supervisor, for corporation counsel, or whether he voted for "the Governor's counsel."

5. William Hunter don't know for whom he voted, for any of the State or other offices.

6. Cassius Hunter is as positive that he voted for Governor as he is that he voted for Goodrich.

7. Nicholas Bennett stated first that he voted for William C. Goodrich; and did not notice any resemblance between the Assembly tickets.

8. John Bennett don't recollect particularly whether he voted on female suffrage, or for whom he voted for Prison Inspector, State Treasurer, Comptroller, street commissioner, or whether he voted for them or the mayor or aldermen.

9. Nelson Rowland is clear that he voted for female suffrage as that he voted for Goodrich.

10. James Hand don't know whether he voted on female suffrage, or for any State officer, or for Comptroller, or street commissioner, and can't name any other man than Goodrich on his ticket.

11. James Osborn voted for female suffrage, and don't know one name on his ticket save Goodrich.

12. G. P. Gratacap can't swear positively that he voted for Goodrich.

13. Charles P. Young is positive that he voted for Goodrich, but has no recognition of the indorsement.

14. John S. Young don't recollect voting for anybody but Horace Greeley; don't recollect the indorsement of Assembly ticket, nor whether the ticket contained more than one name.

15. W. R. Marsh swears there were three or four names on the ballot for Assembly.

16. A. F. Warren don't know as he looked at his ticket, or if Horace Greeley's name was on it, or whether he voted for female suffrage.

17. John Olsen does not know whether there was more than one name on Goodrich's ticket, or not, and cannot state whether he ran on the State ticket, and though he remembers seeing the name before he voted, did not examine any tickets at the poll.

18. J. S. Gildersleve did not have his attention particularly called to the Assembly ticket, and only knows it as on the republican series.

19. John A. Bennett declared plumply that he voted for Jones.

20. Arthur W. Foot examined his ticket very particularly with regard to that one vote, but "voted for Governor," and could not swear how he voted for any one other officer than Assemblyman.

21. Oliver Oleson opened all his tickets, and voted for Governor, for both alderman and supervisor, and "to the best of his recollection," Wm. W. Goodrich was in Goodrich's ticket.

22. Jos. Fletcher would not say that he read his tickets before he voted.

23. Stephen Haviland can't tell the name of the man he voted for for Assembly, but knows the name of Goodrich was among the tickets he voted.

24. Thomas W. Shaffer thinks his Assembly ticket may have been indorsed, "For City Officers."

25. Ambrose H. Fletcher, from seeing his ticket, could not swear what was in it.

26. James Shannon could not remember any vote for the one for Assembly.

27. Charles Olsen declared his Assembly ticket was indorsed "State."

28. Michael Bates don't remember anything about the election except that he voted for Mr. Goodrich.

29. Edwin T. Hiscox did not examine his ballots.

30. Timothy Connor did not open his tickets.

31. Henry Strickland did not open his tickets.

32. David Pringle did not open his tickets.

33. Isaac Shepard voted, "as far as he recollects," for Goodrich.

34. Theodore B. Collyer could not tell from whom he received his tickets; received them from a number of people; received both republican and democratic tickets.

35. Edward McWood thinks he voted for Goodrich; don't recollect his first name; knew he voted for mayor.

36. Richard William can't tell a single officer for whom he voted; thinks that he voted for alderman (none running).

37. William Parsons voted for register (none running); may have voted for female suffrage.

38. Alexander McDonald can't say that he looked at more than one ticket.

39. John McMalty did not look at the ticket he voted.

A number of others indicate by their rambling replies, upon the cross-examination, that they did not know for whom they voted, depending entirely upon the person from whom they received their tickets for their correctness. The evidence taken before the committee, and which is annexed to their report, shows that nearly every republican who distributed tickets at this district used no Goodrich tickets, but worked the whole day against him, and in the bunches of republican tickets placed the Jones ticket, for Assembly. This would satisfactorily account for a greater discrepancy than is indicated by the returns.

Your committee, therefore, find the character of the affidavits as not sufficiently reliable to impeach the returns as made by the inspectors of election, and that they therefore regard the claim of Mr. Goodrich as utterly unfounded.

JAMES M. NELSON.

W. G. BERGEN.

OWEN CAVANAGH.

JOHN DECKER.

Resolved, That Hon. William C. Jones, the sitting member, is the lawfully elected representative from the fifth Assembly district of Kings county, and that he is entitled to retain his seat in the Assembly as such representative.

EVIDENCE TAKEN BEFORE COMMITTEE AND REFERRED TO ON
PAGE FOUR OF REPORT.

The Goodrich-Jones case had its final hearing this afternoon. The room was small, crowded and infernally hot. I append a full report of the verbal testimony. The written correspondence was some three hundred pages, and is, I believe, fairly represented by the abstract I sent you yesterday as the probable line of the sitting member's defense.

William H. Barker, being sworn, testified that he was a republican; that he was near the polling place in the third election district of the twentieth ward on the day of the election last fall, and tributed several State republican tickets with Mr. Jones' name instead of Mr. Goodrich's name; that the persons who used these tickets to vote with did not know they were voting for Mr. Jones.

Mr. G. T. Cook sworn, testified: I was one of the canvassers in the third election district of the twentieth ward of Kings county at the last election; in counting the Assembly votes I called them off one by one, and passed them over to Mr. Reid, the other canvasser, whose duty it was to see that my call was accurate; I believe that Mr. Jones received the most votes, but I cannot recall the numbers; I called off the names in all respects accurately and truthfully; there were two policemen in the room about four feet from me and some citizens who were about ten feet off; I, of course, watched the canvass, and I saw no effort at miscounting, or anything that excited my suspicions; my politics are "betwixt and between;" I voted half and half in that election; I voted for three republicans and the balance democrats; I am a painter by trade, in business for myself; I lived at the time of the last election at 71 Hamilton street; Mr. Jones lived at 109 Hamilton street; I have not boarded with him before or since the election, nor has he paid my board; I have worked in the navy yard.

Alexander Cashow, sworn, testified that he had been present on the third election district above mentioned, and took a part in distributing republican tickets; that the tickets which he distributed contained the republican series of names, except that Mr. Jones' name was inserted for Mr. Goodrich's; that when persons asked for republican tickets, he gave them these tickets with Jones' name in; that some of these persons would take these tickets and vote with them without examining them.

Wm. C. Kingsley, sworn, testified that he had known Mr. Isaac Reid, one of the canvassers at the election in question, and that said Reid was a very intelligent and talented young man, and of an excellent character; that he saw Mr. Reid a few days before his

death, a month or two after the election, and that he (Reid) had said that, so far as he knew, everything pertaining to the counting of these votes was entirely correct, and that if anything wrong had been done he was not aware of it.

G. W. Reid, father of the Mr. Reid, canvasser, referred to by the last witness, being sworn, said: My son was ill from the time of his mother's death; so ill that he was hardly fit to act on the day of election; he came home early in the morning from the polls and was very ill; that evening I heard of the charge of fraud, and I went up to my son's bed and said, "My son, I want you to tell me, your father, if you had any connection with this affair, or if you know anything about it." He said, "Father I had no connection with it, I never heard anything about it; I never saw anything wrong." He died on the 15th of December; I had frequent conversations with him about it; I kept from him the knowledge of the letter Mr. Goodrich had written, but some of the neighbors kindly sent it to him; the interview with Kingsley was on Saturday; he died on Wednesday; he said to Mr. K. that he did not count the votes, that they were counted by Cook.

John Fitzpatrick, a very deaf and ruddy Irishman, testified that he went to serve Jones. He got fifteen slips and put them on top of Goodrich's name. When the people came to him for tickets he gave them these. They took them and voted them. I thought they'd look at 'em, but it seems they did not.

The counsel for Mr. Jones, Mr. De Witt, summed up, and was followed by Mr. Goodrich. The principal points, made by him were the presumption of fraud in the third district, on account of a great discrepancy in his vote as compared with other districts; the general system of fraud practiced in Brooklyn; and the fact that all votes over one hundred and fifty, counted two each for him, requiring only one hundred and fifty-six to elect him, a point perfectly sound.

For testimony and documents, see Assembly document, vol. 11, 1870, pages 7-113.

Case of Anson S. Wood and E. N. Thomas.

WAYNE COUNTY, FIRST DISTRICT — PETITION PRESENTED.

ASSEMBLY CHAMBER, *January 4, 1870.*

Mr. Jacobs presented the petition of E. N. Thomas, for the seat held by Anson S. Wood, as member from the first district of Wayne county, which was referred to the committee on privileges and elections.

Assembly Journal, 1870, page 11. See also, page 222.

REPORT OF COMMITTEE — IN FAVOR OF MR. WOOD.

ASSEMBLY CHAMBER, *March 31, 1870.*

Mr. Nelson, from the committee on privileges and elections, to which was referred the case of the seat of Anson S. Wood, contested by E. N. Thomas, against the said contestant, as follows:

REPORT OF THE COMMITTEE ON PRIVILEGES AND ELECTIONS IN
CASE OF CONTESTED SEAT OF HON. ANSON S. WOOD.

To the House of Assembly of the State of New York:

The committee on privileges and elections, to which was referred the petition of Eran N. Thomas, claiming the seat now occupied by Anson S. Wood, as representative of the first Assembly district of Wayne county, respectfully report, that the committee have heard the proofs and allegations of the respective claimants, and the arguments of counsel, and that the facts of the case as agreed upon, are as follows:

The whole number of votes cast in that Assembly district	
was	4,766
Of which Mr. Wood received	2,400
And Mr. Thomas received	2,366
	<hr/>
Majority for Wood	34
	<hr/> <hr/>

Prior to September 7th, 1869, the town of Butler, in such Assembly district, constituted one election district. On that day the town officers divided the town into two election districts, numbered "one" and "two." One district included part of the village of Wolcott.

At the last election a poll was opened with inspectors regularly pointed in each of the two districts.

The whole number of votes cast in the town of Butler,	
was three hundred and sixty-six. In the first election	
district two hundred and twelve votes were cast, of which	
Mr. Wood received	176
And Mr. Thomas	34

In the second election district one hundred and fifty-four	
votes were cast, of which Mr. Wood received.....	66
And Mr. Thomas	88

Majority in the town for Wood.....	120
------------------------------------	-----

It is claimed on behalf of Mr. Thomas, that the statute directs that when an election district shall be divided, the division shall not take effect till after the next general election; and it is claimed, therefore, that inasmuch as the people of the town of Butler ought all to have voted in a single district instead of having voted in two districts, all the votes of the town of Butler ought to be rejected.

Thus, the only question presented in this case is one of law, viz.: Whether a mistake in the town officers as to the time when an order dividing the district legally made and filed shall take effect, shall disfranchise all the people of the town.

Your committee regard the law of this State on this question as definitely settled by its highest judicial tribunal, in the case of *The People v. Cooke*, reported in 4 Selden's Reports, 67. It

was there decided that no mere irregularity on the part of the town officers can be allowed to vitiate an election, or to disfranchise the voters, where such irregularity has not defrauded a legal voter of his right to vote, or admitted a disqualified person to vote; and where it casts no uncertainty on the result, and has not been caused by the agency of a party seeking to derive a benefit under it.

This rule of law, so just in itself, and so well adapted to secure a fair expression of the popular will, your committee regard as decisive in this case.

The people of the town of Butler have had the most full and free opportunity to exercise their rights as voters, and they are well satisfied with the result. There is no pretense of fraud or injustice, nor even of design. There is no claim that any lawful vote was rejected, or that any illegal vote was received. All the votes cast were those of lawful and qualified voters; and the simple question is whether we shall disfranchise three hundred and sixty-six lawful voters, who have enjoyed the best possible opportunity of exercising the elective franchise.

Your committee have no hesitation as to their duty in this question. They regard the claim made by Mr. Thomas as entirely without foundation or right, and they think the prayer of the petitioner should be denied.

JAMES M. NELSON.

W. G. BERGEN.

WM. T. REMER.

LYMAN OATMAN.

Assembly document, 1870, vol. 10, No. 171.

Which was laid on the table and ordered printed.

In connection therewith Mr. Nelson offered for the consideration of the House a resolution in the words following, to wit:

Resolved, That Anson S. Wood, the sitting member, is the lawfully elected representative from the first Assembly district of

Wayne county, and that he is entitled to retain his seat in the Assembly as such representative.

Mr. Speaker put the question whether the House would agree to said resolution, and it was determined in the affirmative.

Ayes, 91. Noes, none.

Assembly Journal, 1870, vol. 1, page 801.

Case of William D. Murphy and Stephen Springstead.

FIRST DISTRICT, ALBANY COUNTY — PETITION OF STEPHEN
SPRINGSTEAD PRESENTED.

ASSEMBLY CHAMBER, *January 11, 1870.*

Mr. Alvord presented the memorial of Stephen Springstead, claiming the seat awarded by the canvassers to William D. Murphy, as a member from the first district of Albany county, which was referred to the committee on privileges and elections.

Assembly Journal, 1870, vol. 1, page, 52; see also page 222.

REPORT OF COMMITTEE — MR. MURPHY RETAINS HIS SEAT.

ASSEMBLY CHAMBER, *March 21, 1870.*

Mr. Nelson, from the committee on privileges and elections, submitted a report, in writing, upon the case of the contested seat of Hon. W. D. Murphy, sitting member from the first Assembly district of Albany county, and that he is entitled to retain his seat as such representative.

REPORT OF COMMITTEE ON PRIVILEGES AND ELECTIONS IN CASE
OF CONTESTED SEAT OF WILLIAM D. MURPHY.

To the House of Assembly of the State of New York:

The committee on privileges and elections, to which was referred the petition of Stephen Springstead, claiming the seat now occupied by William D. Murphy, as representative of the first Assembly district of Albany county, respectfully report, that the committee

have heard the proofs and allegations of the respective claimants, and the arguments of counsel, and that the facts of the case as agreed upon as follows:

The whole number of votes cast in that Assembly district, was five thousand three hundred and forty.

Murphy received	2,679
Springstead received	2,661
	<hr/>
Murphy's majority	18
	<hr/> <hr/>

As canvassed by the county canvassers.

It is claimed, on behalf of Mr. Springstead, that the returns in three of the election districts were changed, to wit:

The first of Rensselaerville from one hundred and eleven for Springstead, and one hundred and seventy for Murphy, to one hundred and ten for Springstead, and one hundred and seventy for Murphy.

The proof shows that Frederick Luteman offered his vote and was challenged, and his Assembly ticket was put in the box by the inspector before the inspector understood that Luteman was challenged. It was a Springstead ticket, Luteman would not swear in his vote, admitted he was an alien and no voter, and this ticket was one of the original one hundred and eleven for Springstead which was afterward changed to one hundred and ten.

In the third election district of Rensselaerville, a man by the name of David Whitbeck gave his ticket to one inspector, who gave the Assembly ticket, and three others, to one of the other inspectors, who mistook them for the tickets of a Mr. Bouten, and deposited the State ticket and the Assembly ticket in their respective boxes, when his attention was called to the voter being Whitbeck. He, the inspector, Alexander Mackey, challenged Whitbeck, on the ground that he was a non-resident. Whitbeck would not swear in his vote, but admitted that he was a non-resident, and no voter. His ballot for Assembly was in the box, and

was not checked on the poll list as having voted the Assembly ticket.

It was a Springstead ballot. This caused the ballots in the box to exceed the poll list one in number when the inspector came to canvass the votes, and they drew one ballot from the box, which was a Murphy ballot, instead of taking one from Mr. Springstead, for the vote or ballot of Whitbeck, and in this way caused the poll list and votes to agree, which, in this way, gave Springstead.. 45
 Murphy 98

The return in this district was changed from Springstead forty-five and Murphy ninety-eight, to Springstead forty-five and Murphy ninety-nine. When, if the Whitbeck ticket had been deducted from Mr. Springstead's number, it would have left him forty-five votes, and if Mr. Murphy's ticket had not been drawn, he would have had ninety-nine, making the whole number, one hundred and forty-three.

There can be no objection to allow to Mr. Murphy the number of votes thus cast for him in the first district of Rensselaerville, and the third district of Rensselaerville.

The evidence of the contestant shows that in the first district of Rensselaerville, Murphy received one hundred and seventy and Springstead one hundred and ten, and in the third district of Rensselaerville, Murphy ninety-nine and Springstead forty-four.

In this third district of Rensselaerville, two of the men who voted for Springstead, to wit, Eugene Campbell and Franklin Tanner, were not legal voters, but were non-residents; this is clearly proved by the contestant's witness; this would leave the whole number of votes for Murphy, therefore 2,679
 And Springstead 2,658

Leaving a majority for Murphy, thus far, of..... 21

It is claimed by the contestant that in the first election district of Berne, the returns were forged or changed from Mr. Murphy one hundred and thirty-four and Mr. Springstead sixty-seven, to one hundred and forty-four for Mr. Murphy and fifty-seven for Mr. Springstead, making a difference of twenty votes for Mr. Springstead; even were this so (which the contestant has failed to establish by proof), then, in that even, Murphy would have one majority over Mr. Springstead in their Assembly district.

Your committee have no hesitation as to their duty in this case; they regard the claim made by Mr. Springstead, as entirely without foundation or right, and they think that the prayer of the petitioner should be denied.

JAMES M. NELSON.
W. G. BERGEN.
JOHN DECKER.
OWEN CAVANAGH.

Assembly Documents, 1870, vol. 10, No. 170.

See papers and testimony, Assembly Documents, 1870, vol. 3, No. 64, pages 1 to 48 inclusive.

Which was laid on the table, and ordered printed.

In connection therewith, Mr. Nelson offered for the consideration of the House a resolution in the words following, to wit:

Resolved, That William D. Murphy, the sitting member, is lawfully elected representative from the first district of Albany county, and that he is entitled to retain his seat in the Assembly as such representative.

RESOLUTION AGREED TO.

The Speaker put the question whether the House would agree to said resolution, and it was determined in the affirmative.

Mr. Oatman rose in his place and wished to have entered upon the journal the dissent of Mr. Remer and himself from the conclusions of the majority of said committee.

Assembly Journal, 1870, vol. 1, page 802.

Case of Edward D. Lawrence and Howard C. Cady.

SECOND DISTRICT, WESTCHESTER COUNTY — PETITION OF
HOWARD C. CADY PRESENTED.

ASSEMBLY CHAMBER, *January 12, 1870.*

Mr. Husted presented the petition of Howard C. Cady, for his seat as member of Assembly for the second district of Westchester county, in place of Edward D. Lawrence.

Which was referred to the committee on privileges and elections.

Assembly Journal, 1870, vol. 1, page 62. See page 222.

REPORT OF COMMITTEE — EDWARD D. LAWRENCE RETAINS HIS
SEAT.

ASSEMBLY CHAMBER, *April 2, 1870.*

Mr. Nelson, from the committee on privileges and elections, submitted the following report:

The committee on privileges and elections, to which was referred the petition of Mr. Howard C. Cady, claiming the seat now occupied by Edward D. Lawrence as representative from the second Assembly district of Westchester county, respectfully report:

That the committee have heard the proofs and allegations of the respective claimants, and the arguments of counsel, and the facts of the case, as agreed upon, are as follows:

The whole number of votes cast in the second Assembly district was four thousand eight hundred and thirty-one, of which Hon. Edward D. Lawrence received two thousand four hundred and twenty-four; Hon. Howard C. Cady received two thousand four hundred and seven; majority for Lawrence, seventeen, as declared by the county canvassers.

It is claimed, on the part of Mr. Cady, that to make up the two thousand four hundred and twenty-four votes allowed to Mr. Lawrence, there was given by the county canvassers to Edward D. Lawrence, in the third district of the town of North Castle, twenty-four

written ballots bearing the name of William Edgar Lawrence, the said William Edgar Lawrence at the same election running for Assembly in the district adjoining that in which the sitting member was running.

Your committee called before them the president of the board of county canvassers, who testified that at the meeting of the board, at which the canvass was made, the votes cast for William Edgar Lawrence were allowed to Edward D. Lawrence, upon proof presented to them that these ballots were intended for Edward D. Lawrence, the democratic candidate in the second Assembly district, the mistake having been explained by the gentleman who wrote the ballots as arising from the similarity of names having confused him during the excitement of the time, but he positively testified that he intended to write, and supposed that he had correctly written the name of the sitting member.

Upon all the facts presented to your committee, they have come to the conclusion, that although by strict legal rules it may have been improper to have allowed the twenty-four ballots as mentioned above, still your committee have decided that the intention of the parties casting the votes should be considered, and as the evidence is overwhelming that they intended to vote for the sitting member, and as the contestant admits that he has no doubts that the ballots were intended to be for Edward D. Lawrence, they have concluded to report in favor of the sitting member, and as against the contestant.

Resolved, That Edward D. Lawrence, the sitting member, is lawfully elected representative from the second Assembly district of Westchester county, and that he is entitled to retain his seat in the Assembly as such representative.

JAS. M. NELSON.

JOHN DECKER.

W. G. BERGEN.

WM. J. REMER.

OWEN CAVANAGH.

LYMAN WATERMAN.

Mr. Speaker put the question whether the House would agree to said report, and it was determined in the affirmative.

Assembly Journal, 1870, vol. 2, pages 1428 and 1429.

For paper and affidavits see Assembly Documents, 1870, No. 82.

Case of J. Thomas Davis and F. S. Fairchild.

THIRD DISTRICT, RENSSELAER COUNTY — PETITION OF MR.
FAIRCHILD PRESENTED.

ASSEMBLY CHAMBER, *January 12, 1870.*

Mr. Flagg presented the petition of F. S. Fairchild, for the seat held by J. Thomas Davis, as member from the third district of Rensselaer county, which was referred to the committee on privileges and election.

Assembly Journal, 1870, vol. 1, page 11; see page 222.

MR. DAVIS AWARDED THE SEAT.

ASSEMBLY CHAMBER, *April 20, 1870.*

Mr. Nelson, from the committee on privileges and elections, offered the following resolution:

Resolved, That J. Thomas Davis, the sitting member, is the lawfully elected representative from the third Assembly district of Rensselaer county, and he is entitled to retain his seat in the Assembly as such representative.

Mr. Speaker put the question, whether the House would agree to said resolution, and it was determined in the affirmative.

Assembly Journal, 1870, vol. 2, page 1429.

Case of John Carey and Horatio N. Twombly.

SEVENTH DISTRICT, COUNTY OF NEW YORK — PETITION OF
HORATIO N. TWOMBLY PRESENTED.

ASSEMBLY CHAMBER, ALBANY, *January 3, 1871.*

Mr. Gleason presented the petition of Horatio N. Twombly, contestant for the seat as member of Assembly for the seventh district

in the county of New York, which was read and referred to the committee on privileges and elections, when appointed.

Assembly Journal, 1871, vol. 1, page 30.

January 13, 1871.

Mr. Goodrich offered for the consideration of the House a resolution in the words following, to wit:

Resolved, That the committee on privileges and elections be directed to report to the House on or before the 25th of January, instant, upon the matter of the claim of Mr. Horatio N. Twombly to the seat now occupied by the Hon. John Carey, of New York.

Said resolution giving rise to debate,

Ordered, That the same be laid on the table.

Assembly Journal, 1871, vol. 1, page 59.

IN ASSEMBLY, *January 27, 1871.*

Mr. Goodrich offered for the consideration of the House, a resolution in the words following, to wit:

Resolved, That the committee on privileges and elections be directed to make their report, on the claim of Horatio N. Twombly, to the seat now occupied by the Hon. John Carey, with the evidence on Tuesday, January 31st, that the report be printed and made the special order for February 1st, immediately after the reading of the Journal.

Said resolution giving rise to debate,

Ordered, That the same be laid on the table.

Assembly Journal, 1871, vol. 1, page 143.

REPORT OF COMMITTEE, MAJORITY IN FAVOR OF JOHN CAREY.

Mr. Murphy, from the majority of the committee on privileges and elections, to which was referred the petition of Horatio N. Twombly, praying that the seat occupied by Hon. John Carey, of the seventh Assembly district of the county of New York, be awarded to him, submitted a report in the words following, to wit:

The committee on privileges and elections, to whom was referred the petition of Horatio N. Twombly, to be admitted to the seat now held by John Carey of the seventh Assembly district of the county of New York, which petition bears date January 3, 1871, respectfully report, that the seventh Assembly district of the county of New York, is composed of the first, second, third, fourth, fifth, sixth, eighth, ninth, tenth, eleventh, twelfth and thirteenth election districts of the Fifteenth ward of said city; the nineteenth and twentieth election district of the ninth ward of said city, and the eighteenth election district of the sixteenth ward of said city; that the election for member of Assembly for said district was held on the eighth day of November, 1870, that the whole number of votes cast for member of Assembly at this election was four thousand four hundred and ninety-six, of which the petitioner claims to have received two thousand two hundred and twenty-two, and of which the petitioner claims that John Carey received two thousand two hundred and four, of which Howard Marsten received ten, of which there was for blank one, and of which there were scattering fifty-nine.

The petitioner claims by his said petition to have been elected by eighteen votes more than were cast for any other candidate for said office of member of Assembly.

To the petition of the contestant the sitting member interposed a general denial. The testimony and proceedings taken and had before a committee on protest of the board of county canvassers of the county of New York, appointed by said board to investigate the protest of John Carey against the counting of the poll of the twentieth district of the ninth ward, the eighteenth district of the sixteenth ward, and nineteen ballots cast for Horatio N. Twombly, which did not have on their face the number of the Assembly district, was admitted by contestant and sitting member, and agreed by them to be considered by your committee as evidence in these proceedings with the same force and effect as if the witnesses had been examined orally by this committee. A certified transcript of

the canvass by the county canvassers of the county of New York was put in evidence by the contestant, and which may be found at page eighty-nine of the printed evidence.

Thereupon it was suggested by the counsel for the sitting member that the contestant having made the certificate of the county canvass his evidence, he was bound by it, and as that showed upon its face that Carey was elected, the contestant should not be allowed to produce evidence which contradicted the record put in by himself. This view is fully sustained by the case of Stephen Baker against Lewis H. Gregory, who held the certificate of election from the board of county canvassers of Putnam county as the representative of that county, decided in 1867, when the Assembly was largely republican, as in that case the majority of the committee on privileges and elections, on the production of the returns of the board of county canvassers allowed no evidence to be given, but changed the vote as returned by the county canvassers, and reported a resolution admitting the contestant, who was of the same politics as the majority of the House that year, notwithstanding the sitting member offered to prove that four of the votes allowed by the committee of this House for Baker had been counted for him in the election returns.

Your committee, desirous of giving the contestant in the present case the utmost latitude, declined to take the view suggested by the counsel for the sitting member, and allowed the contestant to produce such oral testimony before your committee as he desired.

The only questions at issue before the committee were as to the returns of the twentieth district of the ninth ward, and the eighteenth district of the sixteenth ward. The irregularities alleged in respect to the twentieth district of the ninth ward were: 1. That during, or immediately prior to the canvass of the vote for member of Assembly, in said district, two inspectors of election absented themselves from the polling place, and continued

absent for the space of from ten to fifteen minutes, and thereby caused an adjournment or recess of said board of inspectors, contrary to the provisions of section 13, chapter 138, of the Laws of 1870. 2. That ballots were irregularly counted. 3. That one or more ballots or tickets known and indorsed as "An act in relation to the canal and general fund debts," were counted by the inspectors of election of said district as Assembly ballots, and credited to the contestants.

In respect to these irregularities, first presented to the said committee on protest, and also to this committee, your committee respectfully represent that while they are in contravention of the statute of 1870, and by a strict construction of said statute, perhaps could be rejected, yet as their irregularity arose more from inattention than any apparent design to produce fraud in the canvass of the votes, your committee is of the opinion that the poll of said twentieth district of the ninth ward should be admitted, which is as follows:

For the contestant	181 votes.
For the sitting member	114 "

giving a majority, in said district, for the contestant, of sixty-seven votes.

The irregularity urged before the committee on protest of the board of canvassers (see affidavit of Patrick Reid, at page eight; affidavit of James F. Kelly, page four; and affidavit of Richard Kenehan, page five of printed testimony), and before the committee of this House, in relation to the eighteenth district of the sixteenth ward, consists in the fact that Mr. William Terhune, a person not an inspector, participated in the canvass of the votes for member of Assembly, and did actually handle the votes for member of Assembly, and perform acts and duties allowed by law only to be performed by an inspector of election. See pages 92, 93, 94, 95 and 96 of printed testimony.

The fact of the participation of the said Terhune in handling the ballots before they were opened, was alleged before the com-

mittee on protest of the board of county canvassers of the county of New York, and was fully established before your committee by the oral testimony of Charles F. Denison and David Henriques, inspectors, and Isaac Ludlum, the republican poll clerk in said district. It was also shown by the evidence of these two persons, who were witnesses for the contestant, that the ballots in favor of the contestant could be readily distinguished from the ballots in favor of the sitting member, by the indorsement on said ballots. It also appeared that a person occupying the position of Mr. Terhune, and handling the ballots as he was shown to have handled them, could have substituted ballots in favor of the contesting member for ballots of the sitting member. In other words, that he could have substituted one ballot for another. It further appeared before your committee that said Terhune was a friend and partisan, of the contestant, and a republican in politics, holding the position of republican supervisor under the late statutes of the United States referring to elections. It further appeared before your committee, that said Terhune took no part in the canvass of the general or congressional ballots, but only took part in the canvass of the Assembly ballots. It was not pretended or claimed that Terhune's appointment by Judge Woodruff, as a United States supervisor, gave him any authority to interfere or take part in the canvass of the Assembly ballots.

Your committee are unable to perceive why the aid and assistance of Mr. Terhune was required in the canvass of the Assembly ballots more than in the canvass of either the general or State tickets. While your committee do not desire to cast any imputation upon Mr. Terhune, more than appears in the evidence, your committee cannot fail to suggest, that while Mr. Terhune had an opportunity to appear and testify before the committee on protests of the board of county canvassers of the county of New York, and was also subpoenaed to appear and testify before this committee; in both instances he has failed to present himself to make any excuse or explanation for his participation in

the canvass of the Assembly ballots of the eighteenth district of the sixteenth ward. Your committee have carefully considered the evidence upon this branch of the case, and while they would be unwilling to reject any poll upon mere technicalities, yet in the case of the poll of the eighteenth district of the sixteenth ward, in the judgment of your committee, the violation of the law in allowing Mr. Terhune, not an inspector, to handle the votes of member of Assembly, is palpable, as it offered an opportunity for the commission of fraud. Your committee, therefore, upon due deliberation, have rejected the poll or votes for each of the parties in said district, which were as follows:

For the contestant	238	votes.
For the sitting member	218	"
For Howard T. Marsten	3	"
Scattering	7	"
Total	664	"

Majority for the contestant in this district of twenty votes. The official canvass shows that this district gave a majority of twenty-four for the democratic candidate for Governor, while Mr. Twombly claims to have carried it by twenty majority, a difference of forty-four votes, while he did not show why he ran so far ahead of the republican candidate for Governor.

The law of 1865, the only one in existence prior to the passage of the law of 1870, containing any provision referring to this point and its provision, were confined to the then metropolitan police district, after enumerating the qualifications of inspectors and canvassers, then, goes on to say (see Laws of 1865, chap. 740, sec. 1): "Any person acting as such inspector or canvasser, without the qualifications herein prescribed, and any person who shall pay, or cause to be paid, for the services of such inspector or canvasser, or who shall willfully or knowingly appoint or consent to appoint any such officer without such qualifications,

shall, on conviction thereof, be deemed guilty of a misdemeanor, and shall be punished therefor according to law." It will be readily noticed that this provision is different from the act of 1870, which is as follows: "All persons are prohibited from engaging in or assisting in the canvass and estimate of votes as aforesaid, except the inspectors of election and poll clerks of each district." (See section 13, chapter 138, Laws 1870.) Here is a distinct and positive prohibition against all persons from engaging in or assisting in the canvass or estimate of the votes, except inspectors of election and poll clerks. Can it for a moment be pretended that the act of engaging in or assisting in the canvass or estimate of the votes of the eighteenth election district of the sixteenth ward, by Terhune, was not a direct and palpable violation of this provision of the statute, and being so, the propriety of throwing out the poll of that district cannot, with a due regard to the right of suffrage, be for one moment questioned. The public good is paramount to all private considerations; and certainly there is no case where the public good can be advanced more than by a rigid adherence to the most stringent provisions of the laws governing our elections. It seems to your committee that it would be a most dangerous precedent to establish that the claimant of a board of inspectors, or even a majority of the board, can call in any person to canvass the votes; if they can call in one, they can call in two, three, five or ten. Under such a construction of the law, what security would there be to the ballot? It is much more important to the people of this State that the voting should be regulated by proper laws and the counting of the ballots secured from an opportunity of fraud than that either Mr. Carey or Mr. Twombly should hold a seat in this body.

It should be borne in mind that the act of April 5th, 1870, under which this election was held, is applicable only to the city and county of New York, and was passed by the Legislature for

the purpose of securing to the electors of said city and county a fair election and an honest canvass of the ballots; its provisions do not apply to any other portion of the State. The statute of 1865, Laws of 1865, chapter 740, section 1, referred to above, was repealed by chapter 503, of the Laws of 1870; therefore, on the eighth of November, 1870, when this election took place, there was no election law "respecting" elections other than for militia and town officers" in the other portions of the State which contained any prohibition in relation to persons other than inspectors of election taking part in the canvassing of the ballots; it would seem, therefore, that in the city and county of New York it was the intention of the Legislature, in passing this statute of 1870, to impose the strictest regulations in conducting elections. Your committee, therefore, think it is only carrying out the intention of the Legislature of 1870 in holding all parties to a strict adherence to the provisions of the election laws applicable to elections held in said city and county.

The action of your committee in rejecting the votes of the eighteenth district of the sixteenth ward, is sustained by precedent. In the case of James Jackson against Anthony Wayne, arising on the election of member of Congress from the then lower or eastern congressional district of the State of Georgia, decided during the first session of the second Congress, viz., 1792, the returns of the county of Effingham were rejected by the House of Representatives for the reason, among others, that, as the law of Georgia, at that time, required that three magistrates should preside at election, returns signed by three persons, two of whom were not magistrates, were defective. In the present case, though Terhune did not sign the returns, it is in evidence that he took part in the canvass of the votes; and it seems but fair reasoning that if a return, certified by persons not qualified according to the provisions of the law under which the election is held, is rejected because it is a violation of the strict provisions of the law, the canvass by four persons, one of whom is a citizen, acting in his

individual capacity, having received no appointment or election as an inspector, having taken no oath of office as an inspector, should also be rejected.

In the case of *Howard v. Cooper*, decided by the House of Representatives on the fifteenth day of May, 1860, it was held that as the law of Michigan required that the board of inspectors should consist of three persons, and but two served, the vote was rejected.

Your committee are at a loss to see by what reasoning it can be claimed that if the absence of one member from a board of inspectors shall vitiate the returns, the addition of a person not a member, should not also vitiate the returns, particularly when, as in this case, it is shown by uncontradicted evidence, that the additional member was placed in a situation where it was in his power to commit acts of fraud, and when no responsibility rested upon him as an inspector of election.

In the case of *Dodge v. Brooks*, decided by the House of Representatives in 1866, the poll of the fifteenth district of the eighteenth ward of the city of New York, was rejected on the ground, among others, that the clerk who acted at a board of registry, was neither sworn nor appointed. Your committee can see no reason, if the participation of a person, not a sworn officer as clerk to the registry, should vitiate the election, why the participation of a person in the counting or canvass of votes, not appointed or sworn as an inspector, but an entire stranger, should not vitiate the returns of the district in which he thus unlawfully participated in the canvass. The case of the *People v. Cook*, cited by the contestant, so far from being against the conclusions arrived at by your committee, fully sustain the view they have taken in this case. Your committee, therefore, has concluded to allow the poll in the twentieth district of the ninth ward, and reject the poll of the eighteenth district of the sixteenth ward. The result will be as follows:

FIFTEENTH WARD.

	Horatio N. Twombly.	John Carey.
1st district	141	154
2d district	123	70
3d district	146	110
4th district	171	168
5th district	160	161
6th district	217	200
8th district	179	185
9th district	65	139
10th district	82	155
11th district	43	107
12th district	186	223
13th district	148	107

NINTH WARD.

19th district	142	93
20th district	181	114

SIXTEENTH WARD.

18th district	238	218
	<hr/>	<hr/>
	2,222	2,204
Deduct 18th district, 16th ward,	238	218
	<hr/>	<hr/>
	1,984	1,986
	<hr/> <hr/>	<hr/> <hr/>

Majority for Carey, 2.

Your committee entertain no doubt, after a full investigation of the facts, that a majority of all the legal votes cast in the seventh Assembly district were cast for Mr. Carey; and in coming to this conclusion they have allowed to the contestant every vote to which, in their judgment, he was entitled; giving to him the benefit of all doubts which rested upon their minds, after a most patient and careful examination and deliberation. In accordance with this judgment they recommend the adoption of the following resolution:

Resolved, That the Hon. John Carey, the sitting member, is entitled to the seat in this House as the representative from the seventh Assembly district of the county of New York.

WILLIAM D. MURPHY.

DAVID B. HILL.

GEORGE L. LOUTREL.

WILLIAM W. MOSELEY.

DENIS BURNS.

Mr. Goodrich moved to lay the report and resolution upon the table, and that the same be made the special order for to-morrow morning immediately after reading the Journal.

Mr. Gleason called for a division of the question.

Mr. Speaker put the question whether the House would agree to the first part of the motion, to lay said report on the table, and it was determined in the negative.

Ayes, 60. Noes, 63.

Mr. Speaker then put the question whether the House would agree to the second part of said motion, to make said report a special order, and it was determined in the negative, two-thirds of all the members present not voting in favor thereof.

Ayes, 60. Noes, 63.

MINORITY REPORT.

Mr. Bolt, from the minority of said committee, submitted a report in the words following, to wit:

The undersigned respectfully dissents from the report of the majority of the committee on privileges and elections, declaring the Hon. John Carey, entitled to the seat now held by him from the seventh Assembly district of the city of New York.

The certificate of election was awarded to Mr. Carey, by the county canvassers of New York, by rejecting entirely the votes of the twentieth district of the ninth ward; also, the votes of the eighteenth district of the sixteenth ward. After a thorough scrutiny of the elections held in the districts above named, the following

testimony has been adduced, and upon which the minority of the committee dissent from the conclusion of the majority.

The statute of 1870, section 13, provides "That the several boards of inspectors of election, at the close and without adjournment or recess, publicly proceed to the canvass and estimates of the votes." Under this section of the statute, in the twentieth district of the ninth ward, the inspectors proceeded to the canvass and estimate of the vote of the said district. It appears from the evidence adduced, that after the canvass had continued five or six consecutive hours, Mr. Forbes and Mr. Decker, two inspectors, went out (though not in company), as they say, in "obedience to a call of nature," and were gone five or ten minutes — leaving the box containing the votes for member of Assembly *sealed*, in the care of one inspector, two poll clerks, and in the presence of the United States supervisor and the police. In the meantime, the poll clerks were arranging their papers. After the return of Mr. Forbes and Mr. Decker, the box containing the votes for member of Assembly was unsealed and the canvass was continued to its conclusion, which occurred about 4 o'clock the next morning.

There was no adjournment of the board, or other irregularity, and there is no pretense by the friends of Mr. Carey that any fraud was perpetrated, or attempted to be perpetrated, nor any wrong whatever affecting the purity of the election in said district, and the undersigned can find no reason, either in law or equity, for the disfranchisement of said district of the votes for member of Assembly.

It is the opinion of the undersigned, that there is not an election district in the State where there has not been a temporary absence of some individual member or members of the board of inspectors, and the idea that such absence vitiates the election and disfranchises the whole district, is novel to the minority of your committee.

In the Laws of 1870, section 13, it is provided: "All persons are prohibited from engaging in, or assisting in the canvass and

estimate of the votes aforesaid, except the inspectors of election and poll clerks of each district. Any person offending against this last provision shall be deemed guilty of, and punished as for, a misdemeanor."

It appears in evidence, that in the eighteenth district of the sixteenth ward, Mr. Terhune, a United States supervisor, on the invitation of one of the inspectors of election, did participate in the count and canvass of the vote for member of Assembly of said district, and there is no doubt but that Mr. Terhune rendered himself liable to indictment for this violation of the law in question. But while the law makes ample provision for the punishment of persons violating its enactments, nowhere in the law is there a word or intimation that such violation vitiates the election or disfranchises the electors who exercised the right of suffrage at such election. Besides, there is no proof that any fraud, or wrong of any kind to the interests of Mr. Carey was practiced; but the evidence, so far as it goes, is to the effect that no fraud of any kind was practiced at said election.

In the twentieth district of the ninth ward, the whole vote cast for member of Assembly was three hundred and eleven, of which one hundred and eighty-one were given for Mr. Twombly, and one hundred and fourteen for Mr. Carey, and sixteen scattering, leaving a majority of sixty-seven for Mr. Twombly. In the eighteenth district of the sixteenth ward, the whole vote cast for member of Assembly was four hundred and sixty-six, of which Mr. Twombly, received two hundred and thirty-eight; Mr. Carey received two hundred and eighteen, and scattering ten, leaving a majority for Mr. Twombly of twenty votes.

These majorities honestly belong to Mr. Twombly, which, added to the other majorities of the district, concerning which there is no dispute, elects Mr. Twombly by a majority of eighteen.

Thus believing, the undersigned respectfully recommend the adoption of the following resolution:

Resolved, That the petition of Horatio N. Twombly to be admitted to the seat now occupied by Hon. John Carey, be **granted**.

ALPHEUS BOLT.

ROBERT C. BLACKALL.

Mr. Fields moved the previous question.

Mr. Speaker put the question, "Shall the main question be now put?" and it was determined in the affirmative.

The report and resolutions of the minority of said committee not having been moved as a substitute for the majority.

Mr. Speaker put the question on the adoption of the resolution of the majority of said committee, and it was determined in the affirmative.

Mr. Fields moved to reconsider the vote on the adoption of said resolution, and on that motion moved the previous question.

Mr. Speaker put the question, "Shall the main question be now put?" and it was determined in the affirmative.

Mr. Speaker then put the question whether the House would agree to said motion to reconsider, and it was determined in the negative.

Assembly Journal, 1871, vol. 1, pages 149 to 159, both inclusive.

See for testimony, affidavits, etc., Assembly Documents, 1871, vol. 3, No. 27, pages 9 to 99, inclusive.

Case of Charles T. Duryea and George F. Carman.

IN ASSEMBLY, THURSDAY, *January 9*, 1879.

Mr. Youngs presented a memorial of George F. Carman, claiming his seat as member from the county of Suffolk, in place of Charles T. Duryea; which was read and referred to the committee on privileges and elections, when appointed.

FRIDAY, *January 17, 1879.*

The House met pursuant to adjournment.

Prayer by Rev. Dr. Clark.

The Journal of yesterday was read and approved.

Mr. Baker offered, for the consideration of the House, a privileged resolution, in the words following:

Resolved, That the committee on privileges and elections, to which was referred the petition of George F. Carman, claiming the seat now held by Hon. Charles T. Duryea, have power to send for persons and papers, and that they be authorized to hold meetings for the purpose of taking evidence thereon, in such place in the State as they shall deem necessary, and that they be authorized to employ a stenographer, and have the evidence printed daily, as the case progresses.

Mr. Speaker put the question whether the House would agree to said resolution, and it was determined in the affirmative, as follows:

Ayes, 93. Noes, 00.

THURSDAY, *January 30, 1879.*

Mr. Baker, from the committee on privileges and elections, reported in the words following:

To the Assembly:

The undersigned, a majority of your committee on privileges and elections, to whom was referred the petition of George F. Carman, of the county of Suffolk, contesting and claiming the seat of Charles T. Duryea, as member of Assembly from said county, respectfully report, that they have been attended by the respective parties and their counsel and have heard the allegations and proofs of the parties.

Annexed hereto, and herewith returned, are the petition of the claimant, so referred to your committee, with the formal statement of the claims of the claimant, with the grounds thereof, and the written answer made and filed by the sitting member. Having considered the allegation and proofs of the respective parties, your

committee have found, and do hereby respectfully report, their conclusions of facts and law as follows:

FACTS.

There were three candidates for the Assembly in Suffolk county, namely: George F. Carman (the present claimant), Charles T. Duryea (the present sitting member), and Ellis Smith. In the tabular statement of the aggregate vote, filed and published, it appears, and the county canvassers state, that Carman and Duryea each received four thousand five hundred and seventy-one votes, and Smith received two hundred and three. In the statement of the result on Assembly, afterwards made, the canvassers state the vote as follows: For Carman, four thousand five hundred and seventy-one; for Duryea, four thousand five hundred and seventy-two; for Smith, two hundred and four; for Edward Edwards, one; four votes blank, and one vote returned as defective.

Thereupon the canvassing board, of which Mr. Duryea was a member and gave the casting vote in his own favor, awarded the certificate of election to Mr. Duryea.

The manner in which the board of canvassers brought about this result is as follows: Upon the return of the inspectors of the second election district of the town of Babylon, there appears a ballot headed "Assembly," with the name of "Charles T. Duryea" printed thereon. The word "Duryea" was erased therefrom by means of a pencil, and the word "Carmen" written with pencil on the face of the ballot, and following the word "Duryea." This ballot the inspectors had returned as "Carman, I." The board of canvassers, by resolution, sent back the return to the inspectors, and in due time the supervisor, who was entrusted with that duty, reported back to the board that the inspectors concluded to leave the return as it was. Thereupon the board of canvassers, by a vote of five to four (Mr. Duryea's being the casting vote), decided to allow this ballot as one vote in favor of Mr. Duryea, the sitting member, which had the effect of giving him one majority.

In the sixth district of Brookhaven, a ballot was cast, and is attached to the return of the inspectors, on the face whereof had been printed the words: "For member of Assembly, Charles T. Duryea." This was all erased by pencil, and in their stead was written, as now plainly appears, the words, "George F. Carman;" on the back of this ticket the word "Assembly" appears, printed. On the return, the inspectors say, by writing: "This ballot is rejected as defective." It was not allowed by the board of canvassers. If it had been so allowed by them, in favor of Mr. Carman, the result would have been four thousand five hundred and seventy-two votes for George F. Carman. If the ballot mentioned and referred to, from the second district of Babylon, had not been counted in favor of, and allowed, to Mr. Duryea, his vote would have stood at four thousand five hundred and seventy-one; thus giving Mr. Carman a majority of one.

These are the only questions of fact that are presented bearing upon the question as to the rights of the parties as presented by the face of the returns.

AS CONCLUSIONS.

It is plain upon principle and too well settled by precedent, to require the citation of authorities, that the duty of a board of county canvassers is ministerial. It is their province to ascertain the result of the election by the expressed preference of the electors as shown by their ballots.

As to the ballot from the second district of Babylon, it is very clear that the board of canvassers did wrong in counting the same for, and allowing the same to, Mr. Duryea, for the reason that the elector who cast that ballot did not intend to vote for Mr. Duryea. This he plainly expressed by striking out "Duryea" and writing on "Carman."

It is equally clear that Mr. Carman should have been allowed the ballot which was returned or rejected as defective from the Brookhaven district.

The elector had said on his ballot, "Assembly, George F. Carman." There was but one assemblyman to be elected in the county. This was on a ticket, and in such form as to leave no doubt as to the intention of the voter. It can mean nothing else but a vote for George F. Carman for the Assembly.

It is well settled that the laws regulating the forms of ballots are directory, and that if the voter has expressed his will so that it can be ascertained, he is not disfranchised because he has not observed all the forms.

Your committee have not received any testimony of any facts, except such as shown on the face of the returns before the board of canvassers, and their action thereon and explanatory thereof, holding that, if by a lawful discharge of the duty of the county canvassers, Mr. Carman was entitled to the seat it should be awarded to him, leaving it to Mr. Duryea to contest, if he shall be so advised, rather than that he should continue to hold a seat illegally awarded to him, whilst he shall try to contest the right to the seat by evidence that does not appear on the face of the return. It being manifest that, upon the face of the returns, George F. Carman was duly elected, and should have been awarded the certificate thereof, your committee recommend the adoption of the following resolution:

Resolved, That George F. Carman was, at the last general election, duly elected member of Assembly for the county of Suffolk, and that he is entitled to the seat now held by Charles T. Duryea. All of which is respectfully submitted.

January 29, 1879.

CHARLES S. BAKER.
DAVID W. TRAVIS.
WM. J. YOUNGS.
W. H. STEELE.
JAMES A. ROBERTS.

THURSDAY, *January 30, 1879.*

Mr. Baker moved that said report be laid on the table and printed.

Mr. Speaker put the question whether the House would agree to said motion, and it was determined in the affirmative.

Mr. Baker moved that said report be made a special order for Wednesday morning next, immediately after the reading of the journal.

Mr. Speaker put the question whether the House would agree to said motion and it was determined in the affirmative, two-thirds of all the members present voting in favor thereof.

MONDAY, *February 3, 1879.*

Mr. Flynn, from the committee on privileges and elections, presented a minority report in the matter of the contest of George F. Carman, contesting the seat of Charles T. Duryea, to the Assembly; which was laid on the table and ordered printed.

WEDNESDAY, *February 5, 1879.*

Mr. Speaker announced the order of business, the special order of the day, being the report of the committee on privileges and elections, in the matter of George F. Carman, claiming the seat of Charles T. Duryea, member of Assembly from Suffolk county.

Mr. Brooks moved that the special order be postponed until to-morrow morning immediately after the reading of the Journal.

THURSDAY, *February 6, 1879.*

The House met pursuant to adjournment.

Prayer by Rev. George R. Van De Water, of Oyster Bay,
L. I.

The journal of yesterday was read and approved.

The privileges of the floor were granted to Hon. J. T. Williams and Hon. Mr. Trainor, former members of this House.

Mr. Speaker announced the special order of the day, being the report of the committee on privileges and elections, in the matter of George F. Carman, claiming the seat of Charles T. Duryea, member of Assembly from Suffolk county.

THURSDAY, *February 6, 1879.*

Mr. Berry moved to substitute the minority report of the committee on privileges and elections, in the words following:

To the Assembly:

The undersigned, a minority of the committee on privileges and elections, to which was referred the petition of George F. Carman, claiming the seat now occupied by Charles T. Duryea, respectfully report, that they are unable to concur in the report made by the majority of the committee.

The petition of Mr. Carman, made many charges of gross fraud and irregularity. It charged not only fraud and irregularity on the part of the board of county canvassers of the county of Suffolk, in the canvass by them of the returns from the various election districts in said county, but it also charged that in many districts the votes were improperly canvassed by the inspectors of such districts; that votes were disallowed for said Carman, which should have been allowed to him; that other irregularities were committed by the inspectors of several designated districts; that in many districts voters who would have otherwise voted for said Carman were prevented from so doing by reason of fraud, force and intimidation, exercised by or on behalf of said Duryea.

The answer of Mr. Duryea, not only denied each and every of these specific grounds of contest, but it also averred affirmatively that in a number of districts of said county gross irregularities had been committed by the inspectors of election of such districts, whereby he had been deprived of votes which had been legally cast for him; and that in a particular district the action

of the inspectors of election, was such as to have vitiated the entire poll, and had the entire vote thrown out.

That a number of votes in various districts in said county were canvassed and allowed by the inspectors of such district for George F. Carman, which had been cast by illegal voters.

These were the issues which were presented before your committee for their determination. Upon the hearing all the charges contained in the petition of said Carman were abandoned by him, save and except the charge of irregularity on the part of the board of county canvassers of the returns from the various election districts, and there was no proof presented by him to sustain any charge, except upon the question of supposed irregularity by the said board in the canvass by them of the returns from the second district of Babylon, and the sixth district of Brookhaven.

To sustain this charge said Carman produced before said committee, the returns from said disputed districts and on the face of the returns, asked your committee to award to him the seat now occupied by said Duryea, claiming that the ballot returned by the inspectors of election of the sixth district of Brookhaven as a defective ballot should have been allowed by the county canvassers to him, and that the ballot of the second district of Babylon, which was allowed by the county canvassers for said Duryea, should not have been counted for him, but should have been counted as a defective ballot. Upon no other point was any testimony presented by said Carman.

Proof was offered in behalf of said Duryea in answer to the case presented by said Carman, and in addition he offered to prove, before your committee, the other charges urged by him in support of his right to maintain his seat; and in particular offered to prove that when the box containing the ballots cast for member of Assembly in the second district of Babylon was first opened, and the ballots counted by the inspectors of election of said district, said box contained one hundred and thirty-three ballots, being two bal-

lots in excess of the number called for by the poll lists of said district; that such excess was occasioned by the fact that two ballots cast for said Carman were double ballots, each containing two of his tickets; that said inspectors instead of complying with the law provided for such cases replaced all the ballots in said box, including the excess, and after completing the canvass of all the other boxes adjourned the said canvass, took the said box to a barroom of a hotel, in Babylon, where it remained until the next afternoon, when the inspectors re-commenced the canvass; that upon opening the box at this latter time and recounting the ballots, it was found that but one hundred and thirty-one ballots were then in the box, being the exact number called for by the poll lists in said district.

The witnesses were present and Mr. Duryea offered to prove these facts, but the majority of your committee refused to allow him so to do, and limited him solely to the question presented by said Carman as to the supposed irregularities committed by the board of county canvassers.

Upon the question of the ballot allowed by said Duryea in the second district of Babylon, the testimony being conflicting as to the condition of the ballot when canvassed by the board of county canvassers, we believe that in the exercise of a sound discretion said board had the right to award said vote to said Duryea, and that in so doing no irregularity was committed by them. We are confirmed in this belief from the fact that said Duryea offered to prove before your committee, that when said ballot was taken from the ballot-box by the inspectors of election, his name had not been erased, or attempted to have been erased from said ballot, which proof, however, the majority of said committee refused to receive.

With regard to the vote in the sixth district of Brookhaven, which was returned by the inspectors of election of that district as a defective ballot, and which return was canvassed by the board of county canvassers exactly as received by them, there was no dispute whatsoever upon the facts of the case.

The ballot in question had originally contained the following words: "For Member of Assembly, Charles T. Duryea;" every one of these words had been effectually erased, and in place thereof the name "George F. Carman" written. Nothing else appeared upon the face of the ballot; no office designated.

The election law in this respect is very plain and explicit. Not only must the face of the ballot contain the name of the candidate, but it must also contain the office for which he is voted for.

The exact wording of the statute is that the ballot "*upon the face thereof shall* contain a designation of the office *and* the name of the person to be voted for."

In the ballot in dispute there was no such designation, and hence the inspectors acted in strict accordance with the law in returning said ballot as a defective ballot, and the board of county canvassers would have been guilty of a violation of law had they succeeded in the attempt made by the minority of said board to overrule these inspectors of election and count this ballot for Mr. Carman.

The attention of the Assembly is called to the printed book or pamphlet, prepared under the direction of the Secretary of State, containing the various election laws, with suggestions as to the interpretation of such laws, and with directions as to the manner of complying with the same. It will there be found that ballots in the condition of the one now under consideration are there stated to be defective ballots, and can be counted for no candidate.

No authority has been produced before your committee which would warrant them in allowing the ballot to Mr. Carman, because among all the authorities cited before your committee, not a case was found where there was not some mark or designation *upon the face of the ballot*, from which the courts could infer that the voter intended to vote for the person whose name was on the ballot for some particular designated office. This designation may have been meagre, but yet in every case cited

there was *some* designation, and no case has been presented where a ballot, in the condition of the one in dispute, has been allowed for any candidate. From all the evidence produced before the committee, we think that the board of county canvassers complied strictly with the law, and that their action should not be disturbed. The position taken by the majority is certainly very anomalous. They tell the sitting member that they will not permit him to offer any testimony outside of the returns; that the board of county canvassers should have canvassed the returns exactly as they were produced before them, and that they had no business to go outside of the returns, and allow a ballot to Mr. Duryea which had not been allowed to him by the inspectors of election; and then in the face of this, they go behind the returns of the inspectors and allow this clearly defective ballot in the sixth district of Brookhaven for Mr. Carman. If the rule adopted by them and enforced against Mr. Duryea is correct, then the vote between Mr. Carman and Mr. Duryea was a tie, and neither was entitled to his seat.

The rule of the committee, if a good one, should work both ways, and it should not have been worked one way to *decrease* the vote of Mr. Duryea, and in another way to *increase* the vote of Mr. Carman.

The election of Mr. Duryea was by only one majority over Mr. Carman, and should the ballot cast in the second district of Baby be considered a defective ballot, and that it should not have been allowed to Mr. Duryea, in that case Mr. Carman would not be entitled to the seat, nor would Mr. Duryea, and the county of Suffolk would be unrepresented.

We are of the opinion that if the testimony offered to be proved before your committee in behalf of Mr. Duryea (which the majority refused to receive) had been received, it would have shown, beyond question, that Mr. Duryea received a clear majority of the votes cast in the county of Suffolk.

Certainly such irregularities as are alleged to have been committed by the inspectors of election of the second district of

Babylon, if committed, would vitiate the entire vote of that district, and the entire vote of that district would have to be thrown out and not counted for either party; in which event Mr. Duryea would yet have a majority of the vote of the county. We are also of the opinion that the testimony offered in behalf of Mr. Duryea, tending to show that Mr. Carman received the votes of illegal voters should have been received, and that the other proof offered by Mr. Duryea, showing other irregularities, should also have been received.

The case in dispute is certainly a very close one. The object and design of this committee, as we understand it, is to ascertain whether the contestant (Mr. Carman) or the sitting member (Mr. Duryea) *was in fact legally elected*.

We think that the majority erred in not permitting Mr. Duryea to give evidence tending to prove facts, which, if proved, would certainly, outside of any other question, entitle him to continue in his seat.

We, therefore, offer the following resolution:

Resolved, That in the matter of the contest of George F. Carman, claiming the seat of Charles T. Duryea, it be referred back to the committee on privileges and elections to take such testimony as may be offered in behalf of said Duryea or said Carman, in any way relating to or effecting the right of said Duryea to his seat in the Assembly; and that either party may, if they can, show any facts, either of illegal voting, illegal action, on the part of inspectors of election, or any other acts which in any way will effect the said question.

All of which is respectfully submitted.

MAURICE B. FLYNN.
GEORGE BERRY.

Dated, ALBANY, *February 1*, 1879.

Débate arising thereon,

Mr. Youngs moved the previous question.

Mr. Speaker put the question "Shall the main question be now put?" and it was determined in the affirmative.

Mr. Speaker then put the question whether the House would agree to said motion of Mr. Berry to substitute the minority report for that of the majority report of the committee on privileges and elections and it was determined in the negative, as follows:

Ayes, 25. Noes, 82.

THURSDAY, *February 6, 1879.*

Mr. Speaker put the question whether the House would agree to said report of the committee, and it was determined in the affirmative as follows:

Ayes, 79. Noes, 24.

Mr. Speaker administered the oath of office to Hon. George F. Carman, member-elect from Suffolk county.

Assembly Journal, 102d Session, 1879.

Case of Daniel Patterson and John E. Brodsky.

IN ASSEMBLY, WEDNESDAY, *January 15, 1879.*

Mr. Langbien presented the petition of John E. Brodsky, claiming and contesting for the seat of member of Assembly for the eighth Assembly district of the city of New York, now held by Daniel Patterson, which was read and referred to the committee on privileges and elections, when appointed.

WEDNESDAY, *January 29, 1879.*

Mr. Baker offered, for the consideration of the House, a resolution in the words following:

Resolved, That the committee on privileges and elections, to which was referred the petition of John E. Brodsky, claiming the seat now held by Hon. Daniel Patterson, have power to send for persons and papers, and that they be authorized to hold meetings,

for the purpose of taking evidence thereon, in such place in the State as they shall deem necessary, and that they be authorized to employ a stenographer and have the evidence printed daily as the case progresses.

Mr. Speaker put the question whether the House would agree to said resolution, and it was determined in the affirmative as follows:

Ayes, 70. Noes, 1.

TUESDAY, *April* 22, 1879.

Mr. Baker presented a report from the committee on privileges and elections, in reference to the petition of John E. Brodsky contesting and claiming the seat of Daniel Patterson.

REPORT OF THE COMMITTEE.

To the Legislature:

The undersigned, your committee on privileges and elections, to whom was referred the petition of John E. Brodsky, contesting and claiming the seat of Daniel Patterson, as member of Assembly from the eighth Assembly district of the city and county of New York, respectfully report as follows:

We have heard the proofs and allegations of the respective parties, and the arguments of their counsel. The same having been reduced to writing is herewith returned. It appears, by the official canvass of votes cast for member of Assembly in the district in question, that there were seven thousand five hundred and forty-five votes cast, of which three thousand four hundred and two were for Daniel Patterson, the sitting member; three thousand three hundred and eighty-five were for John E. Brodsky, the contestant; three hundred and seventeen were for Francis Gatterdam; two hundred and fifty-seven were for Paul Ruehl; eighty-three were for Louis P. Howe; thirty-five were defective, and sixty-six were blank, showing upon the face of the returns a plurality of *seventeen* in favor of the sitting member.

No fraud or intimidation was proven upon the trial of the case; but, to maintain the claim of the contestant, the latter called and examined a large number of persons who registered and voted at the election in question as naturalized citizens, upon papers, or naturalization certificates purporting to have been granted in and issued by the Superior Court, and the Supreme Court, in and for the city and county of New York, in September and October, 1868, but whose papers (both the preliminary and the final certificate) were, it was claimed, irregular, fraudulent and void. A large number of witnesses were examined, who held certificates of the alleged character above mentioned, some of whom voted for the sitting member; some for the contestant, and some were unable or unwilling to state the name of the candidate for whom their votes were cast.

We find as our conclusion from the facts proven before us, that, in the cases of nearly, if not quite, all the persons examined as witnesses, who held naturalization certificates, granted in 1868 by the said courts in New York city, that their papers were not granted or issued in conformity to the laws in such case made and provided, but were irregularly issued and fraudulently procured to be granted by persons who, at the time, were evidently in the business of procuring naturalization papers without regard to the forms or provision of law, and that thereby great frauds were perpetrated against the naturalization laws, which deserve the condemnation of all persons irrespective of party, and the enforcement of any and every legal measure to prevent in the future all persons, holding such fraudulently and irregularly procured papers, from exercising the right of suffrage by virtue thereof; to the end, that the purity of the ballot-box may be preserved, and the State saved the cost and exposure and expense inevitable upon a contest like the present.

Of that number it appears, beyond question, that twenty-two voted for the sitting member, the names and particulars concerning which are as follows:

1. John Biler — Owed allegiance to the King of Bavaria. Paper purported to renounce allegiance to the King of Wurtemberg, but the affidavit or oath of renunciation was not signed. The papers were entitled in the Supreme Court and granted in the Superior Court.

2. Isaac Lichenstein — Declared his intentions October 27, 1866, and got his final paper October 10, 1868 — *i. e.* — before the expiration of two years.

3. Lesser Kohn — A native of Germany. His oath of renunciation was to the Queen of Great Britain and Ireland.

4. Peter Morgenstein — Born in Prussia. His declaration of intention related to the Queen of England and Ireland, and oath of renunciation to King of Prussia.

5. Adam Rheinhardt — Came to this country when past 26 years of age, and was naturalized in October, 1868, upon minor papers.

6. Michael Specht — Aged 49 years; been in the country twenty years; can't write; never knew Pat Goff, the witness, who went with him to get his papers. His papers purport throughout to have been signed by him. He was naturalized upon minor's papers, and there was no oath of renunciation whatever.

7. Morris Simon — Aged 58 years; came to this country in 1862; could write, but the signatures to papers were by mark, and he was naturalized upon minor's papers.

8. Charles Kneiss — Aged 45 years; came to this country in 1863; never declared his intentions. Affidavit of declaration made October 12, 1868, changed to October 12, 1865.

9. Bernard Murray — Was 39 years old April 11, 1879. Came here in spring of 1859, over 18 years of age, and yet naturalized on minor's papers.

10. Michael Murray — Aged 59 years; came here in 1849, and was naturalized on minor's papers.

11. Frederick Cordes — A native of Germany. His oath of renunciation was to the Queen of Great Britain and Ireland.

12. Simon Kalisher — Came here when 24 years of age, and was naturalized on minor's papers.

13. Moses Kohn — Came to this country when over 20 years of age, and was naturalized on minor's papers. He could not write, yet his papers purported to be signed by him throughout.

14. James Finley — Aged 60 years; came here in 1847; can't write, and never knew his witness. Yet his application purports to have been signed by him throughout, and he was naturalized on minor's papers.

15. Michael Lynch — Came here when over 18 years of age, and was naturalized on minor's papers.

16. Conrad Klipp — Came here when over 18 years old; naturalized on minor's papers.

17. Francis McBride — Came here when over 18 years of age, and was naturalized on minor's papers.

18. Lippmann Kattz — Came here when over 18 years of age, and was naturalized on minor's papers.

19. Joseph Nuss — Aged 53 years; came here in 1845. His application had attached to it what purports to be an affidavit that he had declared his intentions in Trenton, New Jersey, in November, 1859. Nuss says he was never in New Jersey, and never out of this State since he came here, and that the signature to the affidavit is not his.

20. William Bruegger — Came here when over 18 years old; was naturalized on minor's papers.

21. Louis Wolfe — Came here when over 18 years old, and was naturalized on minor's papers. He don't write, but his application and subsequent papers purport to be signed by him throughout. Neither of the affidavits to residence, declaration, or renunciation have jurats attached, nor has the affidavits of the witnesses.

22. Conrad Nill — Came here when over 18 years of age, and was naturalized on minor's papers.

Of that number it appeared, beyond question, that ten voted for the contestant, namely:

1. Thomas Watkins.
2. Ailbert E. Beh.

3. Ignatz Christopher.
4. John Fries.
5. Louis Hemelrur.
6. Joseph Unger.
7. August Kern.
8. Jacob Heilman.
9. Isadore Lichenstein.
10. Frederick Bodstedts.

In the case of each of whom the same general objections were made, and whose papers, like those of the twenty-two above named, as having voted for the sitting member, are upon their face irregular, and, like them, manifestly fraudulently obtained.

So much doubt arises in the minds of your committee as to who the several other witnesses called and examined voted for, that we cannot find, as fact, that they voted for the sitting member, or for the contestant; and it is not certain that some or all such may not have voted for some other candidate for the same office. At all events, we hesitate to charge either of the parties present with any vote where there appears to be a reasonable doubt. Having reached the conclusions above stated, we have found that from the votes canvassed in favor of the sitting member, Daniel Patterson, namely, three thousand four hundred and two, there should be deducted the votes of the persons above named, as holding irregularly issued or fraudulently procured naturalization papers, twenty-two, leaving his vote at three thousand three hundred and eighty. And from the vote of the contestant, John E. Brodsky, namely, three thousand three hundred and eighty-five, there should be deducted for votes of like character ten, leaving his vote at three thousand three hundred and seventy-five.

It appears, then, that the sitting member has a plurality of five over the contesting party, and should therefore be awarded the seat which he now holds.

Your committee, therefore, recommend the adoption of the following resolutions:

1. *Resolved*, That the several certificates of naturalization, herebefore mentioned and referred to, are void for fraud and irregularity.

2. *Resolved*, That Daniel Patterson was, at the last general election, duly elected member of Assembly for the eighth Assembly district for New York, and that he is entitled to retain the seat now held by him as such member.

3. *Resolved*, That the claim of John E. Brodsky thereto be and the same is hereby dismissed.

All of which is respectfully submitted.

CHAS. S. BAKER.

D. W. TRAVIS.

JAMES A. ROBERTS.

WILLIAM J. YOUNGS.

W. H. STEELE.

MORRIS B. FLYNN.

GEORGE BERRY.

Dated, ALBANY, April 22, 1879.

Assembly Journal, 102d Session, 1879.

Case of Charles F. Trowbridge and James G. Tighe.

IN ASSEMBLY, WEDNESDAY, January 15, 1879.

Mr. Sheridan presented the petition of James G. Tighe, claiming and contesting for the seat of member of Assembly for the fourth Assembly district, Kings county, now held by Charles F. Trowbridge; which was read and referred to the committee on privileges and elections, when appointed.

WEDNESDAY, January 29, 1879.

Mr. Baker offered for the consideration of the House a resolution in the words following:

Resolved, That the committee on privileges and elections, to which was referred the petition of James G. Tighe, claiming the

seat now held by Hon. Charles P. Trowbridge, have power to send for persons and papers, and that they be authorized to hold meetings, for the purpose of taking evidence thereon, in such places in the State as they shall deem necessary, and that they be authorized to employ a stenographer, and have the evidence printed daily, as the case progresses.

The Speaker put the question whether the House would agree to said resolution, and it was determined in the affirmative, as follows:

Ayes 87. Noes 00.

WEDNESDAY, *April 2*, 1879.

Mr. Baker presented a report of the committee on privileges and elections, in the case of James G. Tighe, contesting the seat of Charles Trowbridge, as member of Assembly from the fourth Assembly district of Kings county, in the words following:

IN THE MATTER OF JAMES G. TIGHE, CONTESTANT, FOURTH
ASSEMBLY DISTRICT OF THE COUNTY OF KINGS.

The contestant above named, having appeared in person, and the sitting member in person and by Charles C. Bull, Esq., his counsel, on the 18th day of February, 1879, before the committee of the Assembly on privileges and elections, at the capitol in Albany, the following facts are mutually admitted by the sitting member and contestant:

First. That of the whole number of votes cast at the last general election in the State, held on the 5th day of November, 1878, for member of Assembly of fourth district, Kings county, Charles T. Trowbridge, the sitting member, received six thousand one hundred and seventy-three (6,173), and James G. Tighe, the contestant, four thousand five hundred and twenty-one (4,521), being respectively the highest and next highest number of votes received at said election for said office.

Second. That at the time of said election the said Charles T. Trowbridge was, and for more than one hundred days prior thereto, had been employed by the commissioners of the department of the

city works of the city of Brooklyn, in the bureau of the chief engineer, as foreman of a gang of laborers on street repairs; that his duties, under such employment as a foreman of a gang of laborers on street repairs, was variable under the direction of the chief engineer; that he had no power to do any act or perform any service, except as directed and required by, and in the manner prescribed by, the said chief engineer; that such employment was enjoyed simply at the pleasure of the commissioners; that the said Trowbridge was never required to take, nor has he ever taken, any oath of office; that he received a salary of four dollars a day when actually employed, payable monthly; that the nature of such employment was such that, if there was no work for him to do, the said commissioners were not obliged to pay him a salary during such time as he was not actually employed. The sitting member admits, however, that he was continuously employed, from the date of his employment by said commissioners, December 15, 1877.

CHAS. C. BULL,

Att'y for Chas. T. Trowbridge, Sitting Member.

J. G. TIGHE,

Attorney in Person.

REPORT OF COMMITTEE.

To the Assembly of the State of New York:

The undersigned, your committee on privileges and elections, to whom was referred the petition of James G. Tighe, of the fourth Assembly district of Kings county, contesting the seat of Charles T. Trowbridge, as member of Assembly from said district, respectfully report that they have heard the proofs of the respective parties, and the arguments of their respective counsel, and having considered the same we find and report as follows:

Annexed hereto and herewith returned are the memorial or petition of the contestant, the statement of facts made, agreed to and signed by the respective parties, with the arguments of the counsel made and submitted to us in said case, and while, in our opinion, the question was eminently a proper one to be passed upon by the

Assembly, upon the facts so agreed upon and submitted by the parties, we find, as conclusion of law, that the said Charles T. Trowbridge was not, within the meaning of section 8 of article 3 of the Constitution of the State of New York, "an officer under a city government," within one hundred days previous to his election as a member of this Assembly.

Your committee, therefore, recommend the adoption of the following resolution:

Resolved, That Charles T. Trowbridge was, at the last general election, duly elected member of Assembly from the fourth Assembly district of Kings county; that he was, at the time of his election, eligible to the Legislature; that he be permitted to retain his seat as such member; and that the petition of the said James G. Tighe be and the same is hereby dismissed.

All of which is respectfully submitted.

CHARLES S. BAKER.

D. W. TRAVIS.

W. H. STEELE.

JAMES A. ROBERTS.

WM. J. YOUNGS.

MAURICE B. FLYNN.

GEORGE BERRY.

Dated, ALBANY, *April 1*, 1879.

Mr. Speaker put the question whether the House would agree to said report, and it was determined in the affirmative.

Assembly Journal, 102d Session, 1879.

Case of Joseph Hynes and Thomas Liddle.

IN ASSEMBLY, WEDNESDAY, *January 7*, 1880.

Mr. Slingerland presented petition of Mr. Liddle claiming and contesting the seat of Joseph Hynes of the fourth district of Albany county.

Ordered, That said petition be referred the committee on privileges and elections, when appointed.

MONDAY, *March 8, 1880.*

Mr. Travis, from the committee on privileges and elections, to which was referred the petition of Thomas Liddle, presented by Mr. Griggs, praying for his seat for the fifth district of Albany county, presented the following report and resolution, Messrs. Havens and T. E. Benedict dissenting therefrom.

REPORT OF COMMITTEE.

To the Honorable the Assembly of the State of New York:

Your committee on privileges and elections, to which was referred the petition of Thomas Liddle, claiming the seat occupied by Joseph Hynes, from the fourth district of Albany county, respectfully report: That they have fully investigated the same, have sworn and examined over three hundred witnesses, and have received and examined the returns as made from said Assembly district outside of the fifth election district of the town of Watervliet, as well as from said fifth district, from which it appears that the petitioner, Thomas Liddle, received, outside of said fifth district, three thousand three hundred and seventy-four votes, and Joseph Hynes, the sitting member, received, in the same portion of said Assembly district, three thousand one hundred and fifty-six votes, leaving a majority for said Liddle of two hundred and eighteen votes.

That this portion of the returns was undisputed, the only contest or dispute being as to the said fifth district of the town of Watervliet.

That the aggregate vote of that district for member of Assembly, as given by the returns of the inspectors for that district, was seven hundred and forty-four, divided as follows:

For Joseph Hynes	556	votes.
For Thomas Liddle	181	"
For Thomas B. Boyd	7	"
<hr/>		
Total	744	"

or a majority for Mr. Hynes over Mr. Liddle of three hundred and seventy-five, and which, if correct, elected said Hynes by a majority of one hundred and fifty-seven.

Your committee respectfully further report that it was clearly proved before us that there were at least two hundred and eighty-three electors of the fifth district of said town of Watervliet who cast their ballots for the said Thomas Liddle at said poll, at the last election, which in the judgment of your committee, impeaches the returns from that district, and renders it necessary under the rules of law, to reject or throw out the said return, which would leave the said Liddle elected by a majority of two hundred and eighteen.

Your committee, although having no doubt of their right and power, under the rules of law, to allow to said Liddle the two hundred and eighty-three votes proved to have been cast for him at said poll, thus materially increasing his majority, have deemed it unnecessary.

Your committee further shows, that without throwing out such returns from said district entire, but allowing to said Liddle the number of votes thus proved to have been cast for him, the result would be as follows:

Whole number for both candidates, 737.	
For Joseph Hynes	454
For Thomas Liddle	283

or a majority in that district for Mr. Hynes of 171
which deducted from the majority for Mr. Liddle outside this district of two hundred and eighteen, would elect Mr. Liddle by a majority of forty-seven.

Your committee further report, that in their opinion the inspectors in said district, and the clerks, or a portion of them, willfully and designedly falsified the actual vote cast in said district, either by a false count, or in announcing the result, in that

they allowed to said Hynes a pile of ballots of eighty which belonged to or should have been allowed to the said Liddle, and when their attention was called to it, persisted in the claim that they belonged to said Hynes, and almost immediately swept the ballots into the box, thus preventing a discovery and correction of their crime or error.

Your committee further report, that this fraud upon the ballot was the better enabled to be perpetrated from the fact, that two of the inspectors belonged to the same political party with Mr. Hynes, and both clerks also until about the time the canvass began, and then, at the suggestion of some person, the Republican inspector, being a one-armed man, was induced to leave, and another nominal Republican, although a partisan of Mr. Hynes, voting and working for him, put in his place, and because the inspectors did not each of them count all of the ballots, and the clerks did not see the count, and permitted one of their number to call off to the clerks and the number of ballots in each pile for each of the candidates, and an understanding between him and one or both of the clerks could change the actual vote double the number of any pile without much fear of detection.

Your committee, therefore, suggest that further safeguards should be thrown around the counting of the ballots by the inspectors, either as provided for by the bill now before the Legislature or in some other way, or the elections will be a mere mockery when in the hands of incompetent or dishonest inspectors and clerks.

Your committee, therefore, find and report that the said Thomas Liddle was duly elected member of Assembly from the fourth Assembly district of Albany county, and should have received the certificate of election instead of Joseph Hynes, and recommend the adoption of the following resolution:

Resolved, That Thomas Liddle was, at the last general election, duly elected to the Assembly from the fourth Assembly district

of Albany county, which seat is now held by Joseph Hynes, and that the said Thomas Liddle is hereby awarded the same.

All of which is respectfully submitted.

DAVID W. TRAVIS.

W. H. STEELE.

H. J. HURD.

C. H. DUELL.

JOHN WARNER.

PETER D. LEFEVER.

Dated, *March 8, 1880.*

Mr. Travis moved that said report be laid on the table and ordered printed.

Mr. Speaker put the question whether the House would agree to said motion, and it was determined in the affirmative.

Mr. Travis moved that said report be made a special order for Thursday morning, immediately after the reading of the journals.

THURSDAY, *March 11, 1880.*

Mr. Speaker announced the special order of the day being the report of the committee on privileges and elections in the contested seat case of Liddle *v.* Hynes.

THURSDAY, *March 11, 1880.*

Mr. T. E. Benedict moved to substitute the following minority report of the committee on privileges and elections, for that of the majority report of said committee:

To the Assembly:

The undersigned, member of the committee on privileges and elections, respectfully submit the following report, which dissents from the views of the majority of said committee as expressed in a report in which they recommend that the seat now occupied by Hon. Joseph Hynes be awarded to the contestant, Thomas Liddle.

The petition of the contestant claims that he was chosen member of Assembly from the fourth district of Albany county, at the last general election; and that the certificate of election, based upon charges of a fraudulent count in the fifth district of Watervliet, of said county was wrongfully issued to, Joseph Hynes, the sitting member.

The evidence introduced in support of the claims and charges of the contestant do not furnish proofs of fraud; but, on the contrary, proves the canvass of votes at the disputed polls to have been open, fair and correct.

These important and conclusive facts are set aside on the part of a majority of the committee, on the grounds that the inspectors and clerks of the poll are incompetent witnesses, inasmuch as they are not disinterested in the proof of the charges of fraud.

The straightforward testimony of these sworn officers of the law is considered by a majority report a nullity, and a testimony of two hundred and eighty-three out of three hundred and three electors sworn on the part of the contestant considered valid to increase the vote of the contestant at the polls in the fifth district of Watervliet one hundred and two votes in excess of the one hundred and eighty-one awarded as the true returns as made by the board of canvassers, thus securing a majority of forty-seven for the contestant in the district, and on which you are asked to award him the seat he claims.

This unreliable testimony of electors that participated in a well-established trade of votes between the friends of Joseph Hynes, democratic candidate for Assembly, and D. F. Tighe, republican candidate for coroner, whereby each of them largely profited by receiving an excess of votes, above the other candidates on their respective ticket, is further made unreliable by their present desire to be right on the party record, and their almost uniform inability to testify as to the name of another single candidate, except the one they had been coached to name on the Assembly ticket voted.

The undersigned cannot believe that this Assembly will, upon such testimony, reverse the declared result as shown by the board of canvassers, and furnish a precedent which will hereafter serve as a pretext on which in every close result between candidates the flimsy testimony of such witnesses may, at any period after an election, serve to defeat the will of the people as expressed by the ballot-box.

We, therefore, respectfully recommend the adoption of the following resolution:

Resolved, That Joseph Hynes was duly elected member of Assembly from the fourth Assembly district of Albany county, at the general election held therein on the 4th day of November, 1879; and that he is entitled to ~~retain~~ the seat in this House which he now occupies.

All of which is respectfully submitted.

THOMAS E. BENEDICT.

ROBERT GRANT HAVENS.

EDWARD P. HAGAN.

Dated, *March* 10, 1880.

Mr. Alvord moved that the time of this session be extended until the special order is disposed of.

Mr. Speaker put the question whether the House would agree to said motion, and it was determined in the affirmative.

Mr. Travis moved the previous question.

Mr. Speaker put the question "Shall the main question now be put?" and it was determined in the affirmative.

Mr. Speaker then put the question whether the House would agree to the motion to substitute the minority report for the majority report, and it was determined in the negative.

Ayes, 28. Noes, 79.

Mr. Speaker then put the question whether the House would agree to the adoption of the majority report, and it was determined in the affirmative.

Ayes, 80. Noes, 31.

Assembly Journal, 103d Session, 1880.

Case of Andrew S. Draper and Daniel Casey.IN ASSEMBLY, WEDNESDAY, *April 13, 1881.*

Mr. Brodsky, from the committee on privileges and elections, to which was referred the petition of Daniel Casey for the seat now held by Andrew S. Draper, presented a report in the words following:

To the Assembly:

Your committee on privileges and elections to which was referred the petition of Daniel Casey, hereto annexed, praying for the seat now held by Hon. Daniel S. Draper, as member of Assembly for the second Assembly district for the county of Albany, do respectfully report, that they have been attended by the contestant and his counsel, Hon. Matthew Hale, and by the sitting member and his counsel, Hon. Rufus W. Peckham and Alden Chester, Esq., and who filed the answer to the petition of the contestant which is also hereto annexed.

It was admitted by counsel for the sitting member that at the time of his election to the Assembly, in November, 1880, he was a member of the board of public instruction of the city of Albany, and that he took the oath of office as a member of such board before the mayor of said city of Albany. This fact being conceded, the only question before the committee for decision was one of law and arose under section 8 of article 3 of the constitution of this State, which provides as follows: "No person shall be eligible to the Legislature who at the time of his election, is, or within one hundred days previous thereto, has been a member of Congress, a civil or military officer under the United States, or an officer under any city government." Was Mr. Draper, at the time of his election to the Legislature, an officer under a city government, within the meaning of this section of the constitution, and therefore ineligible to the office of member of Assembly?

This constitutional question was ably argued before the committee by the learned counsel for the respective parties, and the committee after careful consideration, are unanimously of the opinion that the question must be answered in the negative.

The board of public instruction in the city of Albany was established by special act of Legislature, chapter 444 of the Laws of 1866, by which it was provided, among other things, that "The said board of public instruction shall have the control and management of the several public schools in the city of Albany," and "Shall possess and exercise all the powers now conferred by law upon the present board of education of said city." By chapter 516 of the Laws of 1855, establishing the board of education, it was provided "That said board shall possess all the powers now conferred on the commissioners of the district schools of the city of Albany." By chapter 128 of the Laws of 1844, the board of commissioners of the district schools was established with certain defined powers "And generally to possess the powers, discharge the duties and be subject to all of the obligations of the several trustees and other school officers of the said city of Albany as granted and imposed by the several acts now in force in relation to said district schools of said city." By chapter 240 Laws of 1830 a board of commissioners was established, possessing "Like powers and subject to like duties and liabilities as the same officers and persons in the towns of this State."

Thus we see that the duties and liabilities of members of the present board of public instruction in Albany rests upon the same footing as trustees in the various towns of the State, with such increased powers as the Legislature has seen fit to give, and the Supreme Court has held that trustees of school districts are neither county, city, town or village officers. (*People v. Bennett*, 54 Barb. 480.)

Instead of being local or municipal officers or under local or municipal rule, it was held by the Court of Appeals in a recent case, that school officers in New York city were not amenable to the city corporation in any respect in the discharge of their func-

tions, but were public or State officers, charged with duties which belonged to an important branch of the State government, and the decision was made in the face of the fact that the department of public education in the city of New York was by the charter of that city, section 7, chapter 574, Laws of 1871, formerly constituted a branch of the city government. (*Ham v. The Mayor*, 70 N. Y. 459.)

As early as 1812, the State of New York undertook the work of organizing a system of public education by which children should have the means of receiving instruction in the common branches at the public expense. This system has been perfected and enlarged to such an extent that the State now, not only gives free instruction to every person between the ages of five and twenty-one, but as to children between eight and fourteen years, compels their attendance at school a certain portion of each year, at the public expense. This work, therefore, is public in the broadest possible sense; but what would be proper agencies for carrying it forward in the rural districts would lack efficiency in large villages and cities, and hence we find that the Legislature has wisely made the system so flexible that the needs of every locality are met, and by methods differing according to different circumstances, but all working together for the common good, as parts of the public school system of the State. And this system is one over which the State retains general supervision through the State superintendent of public instruction. The schools in Albany as elsewhere in the State are subject to his visitation. (Code of Public Instruction, page 124, section 13.)

He annually apportions the income of the United States deposit fund, the common school fund and the moneys raised by tax for schools, to the various school districts, cities and incorporated villages of the State, on the basis provided by law, to be used for the gratuitous education of children of school age, and the city of Albany receives its share, the moneys being apportioned upon reports made under the law from the several school districts and cities of

the State. (Id. pp. 149, 150, 151, 152, and 153, sections 1, 5, 6 and 7.) He also has jurisdiction to hear appeals from any official act of the board of public instruction in Albany, under any act pertaining to common schools. (Id. p. 73, sec. 1, subd. 7.)

By the act creating the board of public instruction (chapter 444, Laws of 1866), above referred to, twelve persons are named who, as declared in the act, "shall constitute a body to be known as the board of public instruction of the city of Albany," and the members "shall continue to hold their office until their successors shall be elected," and the act provides for perpetual succession in office. By this act also, and the several acts amendatory thereof or supplemental thereto (chapter 2, Laws of 1867; chapter 703, Laws of 1869; chapter 500, Laws of 1870; chapter 11, Laws of 1872; chapter 14, Laws of 1875; chapter 345, Laws of 1875; and chapter 305, Laws of 1877). The board has among other things exclusive power to remove any of its members for cause, to fill all vacancies in their body, that may occur from any cause, to appoint one of their number president, to appoint a superintendent of schools who shall also act as secretary of the board. The board also "shall have the control and management of the several public schools, and have power to fix the different grades of study which shall be taught, and to change the same, to adopt rules and regulations for the administration and government of the schools, and for the admission of pupils, and to purchase and acquire lands for the purpose of erecting schoolhouses, and to take real estate under the right of eminent domain by proceedings initiated by them alone and taken in their own name.

These acts are separate from the charter of the city, which does not even enumerate the board of public instruction as one of the departments of the city government. (See city charter, chapter 77, Laws of 1870, section 10.) From an examination of the act creating the board and the several acts amendatory thereof and supplemental thereto, and also of the charter of the city, it is evident to us that it was the intention of the Legislature to make the

board independent of the city government and not subject to its control. The charter provides the powers, tenures and duties of all the city officers, and gives the mayor power to suspend for cause any officer of the city, and when suspended the common council may appoint a committee of investigation and may dismiss such officer, and declare his office vacant, and thereupon it may be filled by the mayor. (Chapter 536, Laws of 1871, section 6.) But the fact that the charter does not in any way prescribe any of the duties or powers of the members of this board, that the mayor cannot suspend or the common council remove, even for cause, any member of the board, which powers reside, as we have seen, exclusively in the board, together with the further facts that the duties of members of the board, as prescribed by the several special acts referred to, do not in any way relate to the administration of the city government, that the members constitute a "body" with perpetual succession that neither the mayor nor common council can in any way control them as to the tenure of the office or the manner of discharging their duties, are conclusive to our minds that they are independent of the city government and that the Legislature never intended them to be and did not in fact make them officers under the city government, but created the board a separate, distinct and independent body body to carry out the educational system and policy of the State in the city of Albany.

If the view we have taken of these statutes be the correct one it will be unnecessary for us to refer to many matters urged by the learned counsel for the contestant in support of a different construction. We will, however, refer briefly to several of the most important considerations urged by him in support of his theory.

It was said that the members of the board were elected by the people at the charter election; that the returns of their election were certified to the common council who canvassed them, that the city provided the ballot-boxes and that the charter in section 1 of title 5 (Session Laws, 1870 page 173), relating to "election," enumerated members of the board as "officers of the city" when

providing for the time and place of electing such officers. But none of the legislation concerning the time or the methods of electing members of the board changes, modifies or defines the character or nature of their office, which, as we have seen, was fixed by the special laws creating the office, and it does not make them officers under the city government, because it had been found convenient to elect them at the charter election rather than at some other time.

It was also said that the title to real estate acquired by the board for school purposes vests in the city. (Chapter 703, Laws of 1869.) This is true, but the entire beneficial interest in and control over such land is in the board, the city cannot tax it or dispossess the board or exercise any authority or control over it so long as it is used for school purposes; while the mere naked legal title is in the city, the entire beneficial interest, use and control over it is in the board; and as to raising money to pay for land, buildings and repairs, or for the support and maintenance of the schools, the authority of the board is exclusive and supreme, and neither the chamberlain, the common council, the mayor or any officer or department of the city government has any voice or control in the matter, with the single exception that by the act of 1877, chapter 305, the mayor may object to items certified by the board as necessary for school purposes, but the board may by a three-fourths vote override the objections.

But it is also said that the moneys raised and received for school purposes was held by the chamberlain of the city. (Chapter 444, Laws of 1866, section 13). He is, however, the mere depositary of the fund, the banker for the board, the moneys are wholly subject to the order of the board, and are paid only on drafts signed by its president and secretary.

The view we have taken concerning the character of this board and its members is in harmony with the decisions of the courts of this State in relation to such board.

The case of *Ham v. the Mayor*, 70 N. Y. 459, involved the determination of the legal relation between the city of New York

and the department of public education, which by the charter of New York was expressly made a branch of the city government. Judge Miller, in delivering the unanimous opinion of the Court of Appeals (Rappalo, J., being absent), says: "The act of 1871 does not, however, declare that this department shall possess the power and privileges of a corporation, but it evidently was the apparent intention to make its officers and servants, to a great extent, independent of the corporation, and not liable to the control of the city government. Whether it was a corporate body is not material, for, although formally constituted a department of the municipal government, the duties which it was required to discharge were not local or corporate, but related and belonged to an important branch of the administrative department of the State government. Although the commissioners were appointed by the mayor, they were vested with full power and authority to manage and control the educational interests of the entire municipality, and to appoint all subordinate officers and employees, who were subject to their government and control exclusively, and were their servants and subordinates. The commissioners, in the discharge of their functions were not amenable to the corporation in any respect and those who were in their employ as servants and subordinates were subject to the commissioners, bound to obey their orders and directions, and the defendant had no authority whatever, either to employ, manage, control and direct their action, or to remove or discharge them for unskillfulness or neglect of duty.

"Having no right either to select or to remove, as already seen, the rule of *respondeat superior* could not well be applied. To render the corporation liable for the acts of officers or agents, they must necessarily have been its agents and servants, selected or appointed, and liable to be removed by and responsible to the corporation for the manner in which they should discharge the trust reposed in them; and even when represented or elected by the corporation, it is only when the duties relate to the exercise of a corporate power, and are for the benefit of the corporation that they are servants and agents within the maxim referred to. If only

elected or appointed in accordance with the mandates of the law to perform a duty which is neither local nor corporate, and if they are independent of the corporation in the tenure of their office, and the mode of discharging its duties, they are not servants or agents of the corporation, but public or State officers, with such powers and duties as the statute prescribes, and no action lies against the corporation for their acts or negligence."

The above case shows conclusively that the Court of Appeals holds an officer of the board of education in New York is not an officer under a city government, for if he were, then the city would be liable for his acts.

To the same effect is the case of *Dannat v. The Mayor, etc.*, 6 Hun, 88; affirmed, 66 N. Y. 585.

Judge Miller in the case of *Ham v. The Mayor*, cites with approval the case of *Maximilian v. The Mayor*, 62 N. Y. 160, which was a case involving the legal relations between the city of New York and the commissioners of public charities and corrections of that city. Five commissioners under the statutes were appointed by the mayor and constituted a "board," which by express provision was made one of the departments of the city government. The plaintiff's intestate was struck and killed by an ambulance driver, one in the employ of the commissioners. The plaintiff sued the city for damages and the Court of Appeals held that the city was not liable on the ground that the Legislature had created the commissioners of charity in New York a body of independent of the city, which, though appointed by the city, exercise powers of a general and public nature from which the city derive no benefit, and over which it exercised no control; hence, the members of such body were not officers of the city government or subordinate to it, and the city was not liable for the acts of the employees of such body. Judge Folger, in giving the opinion of the court, in that case, says:

"There are two kinds of duties which are imposed upon a municipal corporation; one is of that kind which arises from the grant of

W. B. B. B.

a special power, in the exercise of which the municipality is as a legal individual, the other is of that kind which arises or is implied from the use of political rights under the general law in the exercise of which it is as a sovereign. The former power is private and is used for private purposes; the latter is public and is used for public purposes. 'But where the power is entrusted to it,' the city as one of the political divisions of the State and is conferred not for the immediate benefit of the municipality, but as a means to the exercise of sovereign power for the benefit of all citizens, the corporation is not liable for nonuser, nor for misuser by public agents. Where the duties which are imposed upon municipalities are of the latter class, they are generally to be performed by officers who, though deriving their appointments from the corporation itself, through the nomination of some of its executive agents, by a power devolved thereon as a convenient mode of exercising a function of government, are yet the officers and hence the servants of the public at large. They have powers and perform duties for the benefit of all the citizens and are not under the control of the municipality which has no benefit in its corporate capacity from the performance thereof. They are not then the agents or servants of the municipal corporation, but are public officers, agents or servants of the public at large, and the corporation is not responsible for the acts or omissions of the subordinates appointed by them.

"And where a municipal corporation elects or appoints an officer in obedience to an act of the Legislature, to perform a public service in which the corporation has no private interest, and from which it derives no special benefit or advantage in its corporate capacity, such officer cannot be regarded as a servant or agent of the municipality.

"He is the person selected by it as the authority empowered by law to make selections; but when selected, and its powers exhausted, he is not its agent, he is the agent of the public for whom and for whose purposes he was selected."

Assembly Journal, 1891.

The same principal is substantially held in the following cases:

McKay v. City of Buffalo, 9 Hun, 401; Smith v. City of Rochester, 76 N. Y. 506; Fellows v. The Mayor, 8 Hun, 484.

The general rule is that when powers created and enjoined by the Legislature are given and laid upon officers to be named by the municipality, but for the public benefit, and as a convenient method of exercising a function of general government, and where, as in this case, the municipality has no immediate control over or power of removal of the officer, and he is not responsible to the municipality for the manner in which he discharges his duty, he is not a city or municipal officer, but a public one; and since the board of public instruction of Albany falls within this rule, Mr. Draper, the sitting member, is not an officer under the city government, but is a public or State officer, and hence eligible to the Legislature.

There is a recent legislative precedent which is in harmony with the view we have taken, and which alone should be decisive in this case. In 1876, James W. Gerard, who was an inspector of schools in the city of New York, was elected to the Senate. His seat was contested by William Lainbeer, on the ground that Mr. Gerard was an officer under a city government within the meaning of the 8th section of the 3d article of the Constitution, and, therefore, ineligible to the Legislature. But the Senate decided that he was not such an officer, and denied the prayers of the contestant. (See Senate Journal, 1876, p. 209.)

Mr. Gerard's case in its relations and bearings to this one, was so fully and carefully argued and considered in the brief of counsel for the sitting member, Mr. Draper, and our views being so fully in harmony with the positions there taken, that we have annexed that part of the brief to this report. (See note "A.")

For the reasons aforesaid, your committee are of the opinion that the prayer of Daniel Casey, the petitioner, should be denied, and submit for adoption the following preamble and resolution:

Whereas, In the judgment of the Assembly, a member of the board of public instruction of the city of Albany is not an officer

under the city government within the meaning of the 8th section of the 3d article of the Constitution of this State; therefore,

Resolved, That the prayer of Daniel Casey, praying that Andrew S. Draper be declared ineligible to the office of member of Assembly for the second district of Albany county, and that the seat which he occupies be awarded to the petitioner be denied.

All which is respectfully submitted.

Dated, ALBANY, *April* 11, 1881.

JOHN E. BRODSKY,
Chairman.

W. D. GORSLINE.

A. P. FISH.

ARTHUR W. HICKMAN.

JAMES E. GOODMAN.

JAMES W. SHEEHY.

JOHN HENRY M'CARTHY.

JOHN SHANLEY.

JEREMIAH HIGGINS.

THURSDAY, *April* 14, 1881.

Mr. Speaker stated the pending question to be the report of the committee on privileges and elections in the case of Daniel Casey for the seat now held by Andrew S. Draper.

Mr. Speaker put the question whether the House would agree to said report, and it was unanimously determined in the affirmative.

Assembly Journal, 104th Session, 1881.

Case of Henry L. Sprague and Thales S. Bliss.

IN ASSEMBLY, FRIDAY, *February* 16, 1883.

Mr. Rice, from the committee on privileges and elections, to which was referred the petition of Henry L. Sprague, claiming the seat now occupied by Hon. Thales S. Bliss, presented a majority report in writing, in favor of the petitioner.

Mr. Bartlett, from the said committee, submitted a minority report, which was laid upon the table and ordered printed.

MAJORITY REPORT OF THE COMMITTEE ON PRIVILEGES AND ELECTIONS, UPON THE PETITION OF HENRY L. SPRAGUE, CLAIMING THE SEAT NOW OCCUPIED BY HON. THALES S. BLISS.

To the House of Assembly of the State of New York:

The committee on privileges and elections, to which was referred the petition of Henry L. Sprague, claiming the seat now occupied by Thales S. Bliss, as representative of the thirteenth Assembly district of the county of New York, respectfully report, that the committee have heard the proofs and allegations of the respective claimants and the arguments of counsel, and that the facts of the case about which there is no dispute, are as follows:

First. That the contest is based solely upon the result in the fourteenth election district of the thirteenth Assembly district of said county.

Second. That the total number of votes cast in said election district was three hundred and five, of which blank and defective received twelve.

Third. That of said number of votes, either the petitioner, Henry L. Sprague, or the sitting member, Thales S. Bliss, received one hundred and seventy-three, and the other received one hundred and twenty.

The only question in said contest is as to which of the above mentioned parties received one hundred and seventy-three votes and which received one hundred and twenty votes.

Your committee having heard and carefully weighed and considered the testimony in the case find that Henry L. Sprague received the one hundred and seventy-three votes and Thales S. Bliss the one hundred and twenty votes.

Your committee, therefore, decide that Henry L. Sprague is the duly elected member of Assembly from the thirteenth As-

sembly district of the county of New York, and recommend the adoption of the following resolution:

Resolved, That Henry L. Sprague is the duly elected member of Assembly for the thirteenth Assembly district of the county of New York, and is entitled to the seat now occupied by Thales S. Bliss.

All of which is respectfully submitted.

FRANK RICE.
H. S. CLEMENT.
THOS. V. WELCH.
LEROY B. CRANE.
WM. CARYL ELY.
THEODORE ROOSEVELT.
GEO. Z. ERWIN.

MINORITY REPORT OF THE MINORITY OF THE COMMITTEE ON PRIVILEGES AND ELECTIONS, UPON THE PETITION OF HENRY L. SPRAGUE, CLAIMING THE SEAT NOW OCCUPIED BY HON. THALES S. BLISS.

To the House of the Assembly of the State of New York:

The undersigned dissents from the report of the majority of the committee on privileges and elections declaring Henry L. Sprague entitled to the seat now occupied by Thales S. Bliss, and respectfully recommend the adoption of the following resolution:

Resolved, That the petition of Henry L. Sprague, to be admitted to the seat now occupied by Thales S. Bliss, be denied.

All of which is respectfully submitted.

L. CHESTER BARTLETT.
JOSEPH DELEHANTY.

Mr. M. C. Murphy moved that said reports, together with the evidence taken by said committee in said case, be printed, and that the consideration of the same, be made a special order for

Thursday evening, March 1, and that the case be disposed of before adjournment.

Mr. Speaker put the question whether the House would agree to said motion and it was determined in the affirmative, two-thirds of all the members present voting in favor thereof.

THURSDAY, *March 8, 1883.*

When the name of Mr. De Land was called, Mr. M. C. Murphy presented the following telegram, and asked that it be entered upon the Journal.

UTICA, *March 8, 1883.*

To COL. M. C. MURPHY, *Delavan House, Albany:*

Helm and myself are paired on the Bliss case.

• LEVI J. DE LAND.

Whereupon the Speaker declared that Thales S. Bliss was entitled to the seat now occupied by him.

Assembly Journal, 106th Session, 1883.

Case of Michael J. Coffey and Thos. J. Sheridan.

IN ASSEMBLY, FRIDAY, *February 16, 1883.*

Mr. Rice, from the committee on privileges and elections, to which was referred the petition of Michael J. Coffey, claiming the seat now occupied by Hon. Thomas J. Sheridan, made the following report:

To the House of the Assembly of the State of New York:

The committee on privileges and elections, to which was referred the petition of Michael J. Coffey, claiming the seat now occupied by Thomas J. Sheridan as the representative from the fifth Assembly district of the county of Kings, respectfully report, that the committee have heard the proofs and allegations of the respective claimants and the arguments of counsel, and

that the facts of the case warrant the committee in deciding that thomas J. Sheridan was duly elected to the office of member of Assembly for the fifth Assembly district for the county of Kings.

And your committee respectfully recommend the adoption of the following resolution:

Resolved, That Thomas J. Sheridan is the duly elected member of Assembly for the fifth Assembly district for the county of Kings, and is entitled to the seat now held by him.

All of which is respectfully submitted.

FRANK RICE.

H. S. CLEMENT.

THOMAS V. WELCH.

LEROY B. CRANE.

WILLIAM CARYL ELY.

L. CHESTER BARTLETT.

THEODORE ROOSEVELT.

JOSEPH DELAHANTY.

GEORGE Z. ERWIN.

Mr. Speaker put the question whether the House would agree to said resolution, and it was determined in the affirmative.

Assembly Journal, 106th Session, 1883.

Case of Isaac L. Van Vorst and Richard A. Derrick.

IN ASSEMBLY, FRIDAY, *March 16*, 1883.

Mr. Rice, from the committee on privileges and elections, submitted the following report:

To the Assembly:

Your committee on privileges and elections, to whom was referred the petition of Isaac L. Van Vorst, claiming the seat of Richard A. Derrick, as member of Assembly from the Second district of Rensselaer county, respectfully report that they have heard the evidence in the case and the arguments of counsel, all of which are before your honorable body, and find as follows:

That the several allegations, specifications and averments set forth in the petition of the said petitioner, Isaac L. Van Vorst, pertaining to or effecting the right of the said Richard A. Derrick to the seat now occupied by him, are wholly unsustained by the evidence offered and received, and your committee respectfully recommend the adoption of the following resolution:

Resolved, That Richard A. Derrick is legally entitled to the seat now occupied by him, as member of Assembly from the second Assembly district of Rensselaer county.

All of which is respectfully submitted.

FRANK RICE.

H. S. CLEMENT.

S. C. BARTLETT.

GEO. Z. ERWIN.

JOSEPH DELAHANTY.

THOMAS V. WELCH.

LEROY B. CRANE.

WM. CARYL ELY.

THEODORE ROOSEVELT,

Dated, ALBANY, *March 14*, 1883.

Mr. Rice moved that said report be made the special order for Monday evening next.

Mr. Speaker put the question whether the House would agree to said motion and it was determined in the affirmative, two-thirds of all the members present voting in favor thereof.

MONDAY, *March 19*, 1883.

The House proceeded to the consideration of the special order, being the report of the committee on privileges and elections in the matter of the petition of Isaac L. Van Vorst, claiming the seat now occupied by Hon. Richard A. Derrick.

To the Assembly:

Your committee on privileges and elections, to whom was referred the petition of Isaac L. Van Vorst, claiming the seat of Richard A. Derrick as member of Assembly from the second

district of Rensselaer county, respectfully report that they have heard the evidence in the case and the arguments of counsel, all of which are before your honorable body, and find as follows:

That the several allegations, specifications and averments set forth in the petition of the said petitioner, Isaac L. Van Vorst, pertaining to or affecting the right of the said Richard A. Derrick to the seat now occupied by him, are wholly unsustained by the evidence offered and received. And your committee respectfully recommend the adoption of the following resolution:

Resolved, That Richard A. Derrick is legally entitled to the seat as member of Assembly from the district of Rensselaer county, now occupied by him.

.All of which is respectfully submitted.

FRANK RICE.

H. S. CLEMENT.

L. C. BARTLETT.

GEO. Z. ERWIN.

LEROY B. CRANE.

WM. CARYL ELY.

THOS. V. WELCH.

THEODORE ROOSEVELT.

JOSEPH DELAHANTY.

Dated, ALBANY, *March 14*, 1883.

Mr. Speaker put the question whether the House would agree to said report, and it was determined in the affirmative.

Assembly Journal, 106th Session, 1883.

Case of William E. Greenwood and Leman Hotchkiss.

IN ASSEMBLY, MONDAY, *March 19*, 1883.

Mr. Rice, from the committee on privileges and elections, submitted the following report:

To the Assembly:

Your committee on privileges and elections, to whom was referred the petition of William E. Greenwood, contesting and claim-

ing the seat of Leman Hotchkiss, as member of Assembly from the second district of the county of Wayne, would respectfully report that they have heard the evidence in the case and the arguments of counsel, all of which are before your honorable body, and find that the allegations, averments and specifications contained in the petition of the said petitioner, William E. Greenwood, are unsustained by the evidence in the case offered and received, and respectfully recommend the adoption of the following resolution:

Resolved, That Leman Hotchkiss is legally entitled to the seat as member of Assembly from the second district of the county of Wayne, now occupied by him.

All of which is respectfully submitted.

FRANK RICE.

H. S. CLEMENT.

L. C. BARTLETT.

GEO. Z. ERWIN.

LEROY B. CRANE.

W. CARYL ELY.

THOS. V. WELCH.

THEODORE ROOSEVELT.

JOSEPH DELAHANTY.

Dated, ALBANY, *March* 14, 1883.

Mr. Rice moved that said report be made the special order for Monday evening next.

Mr. Speaker put the question whether the House would agree to said motion, and it was determined in the affirmative, two-thirds of all the members present voting in favor thereof.

MONDAY, *March* 19, 1883.

The following report of the committee on privileges and elections in the matter of the petition of William E. Greenwood, claiming the seat now occupied by Hon. Leman Hotchkiss:

To the Assembly:

Your committee on privileges and elections, to whom was referred the petition of William E. Greenwood, contesting and claim-

ing the seat of Leman Hotchkiss as member of Assembly from the second district of the county of Wayne would respectfully report that they have heard the evidence in the case and the arguments of counsel, all of which are before your honorable body, and find that the allegations, averments and specifications contained in the petition of the said petitioner, William E. Greenwood, are unsustained by the evidence in the case offered and received, and respectfully recommend the adoption of the following resolution:

Resolved, That Leman Hotchkiss is legally entitled to the seat as member of Assembly from the second district of the county of Wayne, now occupied by him.

All of which is respectfully submitted.

• FRANK RICE.
H. S. CLEMENT.
L. C. BARTLETT.
GEORGE Z. ERWIN.
LEROY B. CRANE.
WILLIAM CARYL ELY.
THOMAS V. WELCH.
THEODORE ROOSEVELT.
JOSEPH DELAHANTY.

Dated, ALBANY, *March 14*, 1883.

Mr. Speaker put the question whether the House would agree to said report and it was determined in the affirmative.

Assembly Journal, 106th Session, 1883.

Case of Robert E. Connolly and David Lindsay.

IN ASSEMBLY, THURSDAY, *March 29*, 1883.

Mr. Clement, from the committee on privileges and elections, presented a report from said committee in the matter of the petition of Robert E. Connolly, claiming the seat now occupied by the Hon. David Lindsay, which was read as follows:

To the Assembly:

The undersigned, your committee on privileges and elections, to whom was referred the petition of Robert E. Connolly, claiming the seat now occupied by David Lindsay, as member of Assembly for the eighth Assembly district of the county of Kings, respectfully report:

That they have heard the evidence of the witnesses and the arguments of counsel in the case, and, after due consideration of the same, finds as follows:

First. That in the said petition of the said Robert E. Connolly are set forth seven counts or specifications upon which the said petitioner bases his claim to said seat, only three of which, in the judgment of your committee, according to the evidence in the case, now require attention.

Second. That the said three counts or specifications are as follows:

"1. That in the fourth election district of the seventeenth ward in the city of Brooklyn, the return or statement of the board of canvassers shows that five hundred and eight votes, in all, were cast for member of Assembly, of which three hundred and thirty-two were for your petitioner, one hundred and fifty for David Lindsay and twenty-five for Michael W. Collins, making a total of but five hundred and seven, and leaving unaccounted for one ballot."

"That the ballot so uncounted was a ballot indorsed 'Assembly;' on the inside of said ballot 'For Member of Assembly,' with the name of David Lindsay, originally printed on it, erased and the name of 'Rob Conl' written in lead pencil; that said ballot, in fraud of your petitioner's rights and in violation of all law, was not counted; that the intention of the voter who cast such ballot was to vote for your petitioner, and that it should have been counted for him; that said ballot is now in the ballot-box used in the fourth election district of the seventeenth ward of the city of Brooklyn, which ballot-box is in the custody of the police department of said city."

"2. Your petitioner further shows that, in the first election district of the seventeenth ward of the city of Brooklyn, a ballot was found in the Assembly box indorsed 'Assembly' and having printed on the inside for member of Assembly 'Robert E. Connelly,' which ballot was torn in such a way as to erase some of the letters in the word 'Connelly.' That, in fraud of your petitioner's rights, and in violation of law, the said ballot was not counted for your petitioner, but annexed by the board of canvassers to their return to the board of elections. That it was evidently the intention of the voter casting said ballot to vote for your petitioner, and it should have been counted for him and be credited with three hundred votes from said district, instead of two hundred and ninety-nine, as returned by the said board of canvassers."

"3. Your petitioner further shows that in the second election district of the seventeenth ward of the city of Brooklyn, the board of canvassers, after counting the Assembly vote and recording two hundred and eighty-seven as being cast for your petitioner, one hundred and twenty-five for David Lindsay and thirty for Michael C. Collins, placed the ballots in the ballot-box, sealed it and sent it with a statement of the votes cast, as required by law, to the police department, and immediately after the counting of the votes, sent a written statement thereof to the officers in charge of the police precinct, as required by law. That the number of ballots placed in the box for David Lindsay was one hundred and twenty-five and the statement of the vote placed therein as well as the statement sent to the police precinct, showed that but one hundred and twenty-five votes had been cast for Lindsay. The return made by the canvassers, as originally prepared, stated that said Lindsay had received but one hundred and twenty-five votes. That after the ballots were so counted and placed in the ballot-box, and the statement and returns so prepared as aforesaid, a Lindsay ballot, alleged to have been picked from the table was annexed by the canvassers to the return made by them to the board of elections, and the figures changed from one hundred and twenty-five to one hundred and twenty-six, and it was stated on the returns that said ticket was

found on the table and not included in their first report by mistake. That in the counting of the vote of said election district, Lindsay was credited with having received one hundred and twenty-six votes, said ballot having been counted for him in fraud of your petitioner's rights, and in violation of all law, as in fact said ballot was never cast for said Lindsay."

Third. That from the evidence offered and received under the said first count or specification, it appears that an imperfect ballot, in a condition or form resembling the one so described in said first count, was cast and was not counted for any candidate. That the exact names or letters upon the ballot are not known, one of the two witnesses sworn concerning it, making them "Rob Conl," and the other making them "Rob Comb" or "Coml."

Fourth. That the ballot mentioned in the second count or specification was produced and received in evidence, and was found by the committee to be badly mutilated and torn. That the portion of the ballot remaining bore the name of no person, but had upon it, at the left, the letters "Ro," and at the right the letters "ly." The portion of the ballot between these letters being gone; that this ballot was counted for the petitioner, Robert E. Connolly.

Fifth. That the evidence offered and received under the said third count or specification shows that when the Assembly ballots in the said election district of the seventeenth ward of the city of Brooklyn were first counted unopened, they agreed in number with the poll list; when opened and counted their number was one less than shown by the first count and by the poll lists. That this discrepancy was not accounted for until the count had been completed, the ballots returned to the box and sent away, and the statements and returns, required by law, made out and signed by the canvassers. That after these acts had been performed, and before the canvass of any other box was undertaken, an Assembly ballot was found under a tally sheet or other paper on the table where the ballots had been turned from the box and canvassed. That this ballot had upon it the name of David Lindsay, and, by common consent of the canvassers, was counted for David Lindsay;

and that the returns made out and signed, as aforementioned, was so changed and altered as to increase, by one, the number of votes accredited therein to the said David Lindsay.

Upon the foregoing facts and findings, your committee conclude:

First. That the ballot having upon it the letters " Rob Conl " or " Comb," and the ballot having upon it the letters " Ro " " ly " were each so imperfect as to make it improper and illegal to canvass and count either of them for any candidate. In the language of the Supreme Court at General Term, in another and very similar case: " There is not enough of it to be a good ballot in any shape."

Second. That the ballot found under the tally sheet on the table where the ballots had been turned and canvassed, and mentioned in the third count or specification, was properly and legally canvassed and counted for and accredited to David Lindsay.

Third. That David Lindsay is entitled to the seat now occupied by him as member of Assembly for the eighth Assembly district of the county of Kings.

Your committee, therefore, recommend the adoption of the following resolution:

Resolved, That David Lindsay is the duly elected member of Assembly for the eighth Assembly district for the county of Kings, and as such is entitled to the seat now occupied by him in the Assembly of the State of New York.

All of which is respectfully submitted.

FRANK RICE.

H. S. CLEMENT.

THEODORE ROOSEVELT.

LEROY B. CRANE.

L. C. BARTLETT.

THOMAS V. WELCH.

GEORGE Z. ERWIN.

WILLIAM CARYL ELY.

JOSEPH DELAHANTY.

ALBANY, *March 29*, 1883.

Mr. Speaker put the question whether the House would agree to said resolution, and it was adopted unanimously.

Assembly Journal, 106th Session, 1883.

Case of Leonard E. Adsit and Russell S. Johnson.

IN ASSEMBLY, WEDNESDAY, *March 25*, 1891.

Mr. Webster, from the committee on privileges and elections, to which was referred the petition of Leonard E. Adsit for the seat occupied by Russell S. Johnson for member of Assembly from the third Assembly district of Oneida county, reported as follows:

To the Assembly:

The committee on privileges and elections, to which was referred the petition of Leonard E. Adsit of Steuben, county of Oneida, New York, claiming that he was duly elected to the office of assemblyman from the third district of that county, at the last general election held on the 4th day of November, 1890, and that he is entitled to the seat in this body now held by Russell S. Johnson, respectfully report:

That the contestant was duly notified by your committee of the time and place of hearings on the memorial submitted by him to the Assembly, and the readiness of your committee to proceed to take testimony in the matter. Meetings of the committee were called to consider the contest in question as follows: February 26, March 3, and March 17, 1891, at which meetings the contestee appeared in person and by counsel, the contestant failing to appear.

Your committee further report that on the 23d day of March, 1891, a letter was received from the contestant Leonard E. Adsit, the contents of which were as follows:

STEUBEN, *March 20, 1891.*

HON. GEORGE P. WEBSTER, *Chairman Committee on Privileges and Elections, Assembly Chamber, Albany, N. Y.:*

DEAR SIR.—I have received your notice that I could be heard before your committee on the contested seat of R. S. Johnson; and, though I believe that if justice were done I could and would be seated, but as the session is so far advanced, and under all the circumstances, I have decided to withdraw from the contest.

Trusting that I have not worried your patience with my delay, I remain,

Yours, etc.,

LEONARD E. ADSIT.

The contestant not desiring to prosecute the contest as appears but the letter above set forth, your committee recommend that no further proceedings be taken, and that the following resolution be adopted:

Resolved, That Hon. Russell S. Johnson is entitled to hold the seat now occupied by him in the Assembly of the State of New York, as the representative from the third district of Oneida county.

All of which is respectfully submitted.

GEORGE P. WEBSTER.

MATT. ENDRES.

JOHN J. O'CONNOR.

JAMES M. RILEY.

JOHN T. GORMAN.

JAMES H. SOUTHWORTH.

WM. C. STEVENS.

E. H. DAVIS.

JAMES H. PIERSON.

Mr. Speaker put the question whether the House would agree to said report, and it was determined in the affirmative.

Assembly Journal, 114th Session, 1891.

Case of Robert O. Davis and Cornelius R. Sheffer.

IN ASSEMBLY, FRIDAY, *January 23*, 1891.

Mr. Webster, from the committee on privileges and election, reported the evidence and proceedings heretofore taken in the matter of the contest of Robert O. Davis against Cornelius R. Sheffer, for the office of member of Assembly for the first district of Saratoga county; which was ordered printed, and when printed to be recommitted to the committee on privileges and elections.

THURSDAY, *April 16*, 1891.

Mr. Webster from the committee on privileges and election reported the following:

To the Assembly:

The committee on privileges and elections, to whom was referred the petition of Robert O. Davis, of Saratoga county, State of New York, claiming that he was elected to the office of assemblyman from the first district of said county at the last general election held on the 4th day of November, 1890, and that he is entitled to the said seat in this body now held by Cornelius R. Sheffer, respectfully report:

That the parties to the proceeding appeared before the committee in person, and by counsel, and by agreement submitted the case upon evidence under the law, part I, chapter 5, title 7, of the Revised Statutes of the State of New York, which evidence had been taken on notice served by the contestant on the contestee, and briefs of counsel for each of the parties, which have been duly considered by the committee.

Your committee further report that while the evidence shows that at the election held on the 4th day of November, 1890 in the first Assembly district of Saratoga county, there were many irregularities and reprehensible disregard of the election laws, there are

not facts enough established to fully sustain the allegations contained in the petition of the contestant.

Your committee, therefore, further report that the contestee and sitting member, Cornelius R. Sheffer, is entitled to the seat now held by him as a member of Assembly from the first district of Saratoga county, State of New York, and recommend the adoption of the following resolution:

Resolved, That the Hon. Cornelius R. Sheffer is entitled to the seat now held by him in the Assembly of the State of New York, as the representative from the first district of Saratoga county, State of New York.

All of which is respectfully submitted.

GEO. P. WEBSTER.
JAMES M. RILEY.
JOHN J. O'CONNOR.
MATTHIAS ENDRES.
WILLIAM C. STEVENS.
JAMES H. PIERSON.
JOHN T. GORMAN.

Which report was agreed to.

Assembly Journal, 114th Session, 1891.

Case of John F. Dwyer and W. Barlow Dunlap.

IN ASSEMBLY, FRIDAY, *January 23*, 1891.

Mr. Webster, from the committee on privileges and elections, reported the evidence and proceedings heretofore taken before the mayor of the city of Amsterdam in the matter of the contest of John F. Dwyer against W. Barlow Dunlap for the office of member of Assembly for the county of Montgomery; which was ordered printed, and when printed to be recommitted to the committee on privileges and elections:

IN ASSEMBLY, *February 18*, 1891.

Committee's report of the committee on privileges and elections relative to the petition of John F. Dwyer, claiming the seat now occupied by W. Barlow Dunlap, of the county of Montgomery.

To the Honorable, the Legislature of the State of New York:

The committee on privileges and elections, to which was referred the petition of John F. Dwyer, of Amsterdam, county of Montgomery, New York, claiming that he was duly elected to the office of assemblyman from that county at the last general election, held on the 4th day of November, 1890, and that he is entitled to the seat in this body, now held by W. Barlow Dunlap, respectfully report as follows:

The committee find that under the law, part I, title 5, chapter 7, of the Revised Statutes of the State of New York, evidence had been taken before the Hon. Hicks B. Waldron, mayor of the city of Amsterdam, on notice served by the contestant, contestant and contestee both being present and both being represented by counsel; that when such evidence was taken a large number of witnesses were examined before said mayor and were ably and thoroughly examined and cross-examined by counsel for the contestant and contestee; that the evidence so taken makes over two hundred closely printed pages and presents a history of corruption and fraud upon the ballot-box unparalleled in the history of the State of New York.

It is clearly established by the testimony before the committee, first, that there were one hundred and fifty-nine illegal ballots cast for Mr. Dunlap — illegal from the fact that they were marked in violation of law, and were, under the terms of the law, invalid and void; and the evidence made it apparent that the ballots were so marked for the corrupt and fraudulent purpose of identifying the persons who voted them as participants in the conspiracy to secure votes in favor of the contestee and against the contestant by bribery. In short, the scheme was adopted to identify the men who had agreed to accept money for their votes and to render certain to those who paid the bribes that the men to whom the bribes were paid had carried out their part of the corrupt agreement and had voted in accordance with it.

One Abner Burtch, chairman of the Republican county committee and surrogate's clerk of the county, with one Jacob Snell,

a Republican ex-sheriff of the county, had an upper room in a hotel known as the Snell house, in the town of Mohawk, a few hundred feet distant from the polling place of that town; that during the election day large numbers of purchasable votes were led, invited or enticed into this room by persons acting in the interest of the Republican ticket and especially active in the interest of the contestee; that this man Burch, with the assistance of Snell, gave to such voters tickets on which he had erased the name of a candidate on the ticket who had no opposition and placed thereon a fictitious name; that such paster ballots were placed in the hands of these voters with instructions that if they voted them and they came out of the box they would be paid for such voting; and a record was kept of the name of the individual and the fictitious name used on the ticket he was expected to vote; that there were sixty-four votes of that kind cast in that town, and it appears from the evidence that the same scheme and conspiracy extended to every town in the county but one, and that the illegal votes so marked and cast amounted altogether, as stated, to one hundred and fifty-nine. It is a fact shown by the testimony that there was not a single marked or illegal Democratic ticket cast in the entire county. The foregoing facts are established by the evidence of Andrew Cole, Andrew Cole, Sr., David Phillips, Oliver Johnston, George W. Archambault, Harry Billington, Joseph Davenport, Charles Gates, William H. Clark, Solomon Snits, William H. Vosberg, Charles Miller, Jacob H. Billington, Jacob Steenburgh, Andrew J. Peeler, James Dorenburgh, Abel Weaver, Frank P. Austin (Republican watcher at the polls, whose evidence appears in the printed evidence, pages 108 to 114, inclusive), John Guiwits, Benjamin Entermarks, Conrad Shupert and many others.

The evidence also fairly established that there were one hundred and thirty-five votes cast in the different towns of the county for the contestee that were not marked, but were illegal for the reason that the voters casting them were paid for so doing. This appears from the testimony of Andrew Cole, Sr., Abel Weaver,

Jacob H. Billington, Jacob Steenburgh, Andrew J. Peeler, James Dorenburgh, Casper Pickle, Ferdinand Bonine and others.

It appears from the testimony that fraudulent naturalization papers were issued in the county during the year and previous to the election, which were made use of in favor of the contestee, as appears by the evidence, to the extent of at least six votes; that the naturalization papers were issued to these six and a large number of others by a republican county judge and clerk. This appears from the printed evidence, pages 181, 182, 185, 187, 188 and 193 to 198.

The vote of Frank Austin, the republican poll watcher heretofore mentioned, was cast by him in the third district of the town of Palatine, and according to his own testimony his vote was illegal for the reason that he was not a resident of the district. (Pages 111 to 114.)

It appears from the official canvass made by the county board of canvassers of Montgomery county that the contestee received in the county four thousand eight hundred and forty-seven votes, and that the contestant received four thousand seven hundred and nine, giving the contestee an apparent majority of one hundred and thirty-six. From the vote of the contestee there should be deducted the three hundred and one votes, which, from the testimony, plainly appear illegal and fraudulent, leaving a legal majority in favor of the contestant of one hundred and sixty-three.

The hearing before the committee was held on February 12, 1891. Both contestant and contestee were present and represented by counsel. A motion was made by counsel for the contestee for an adjournment of the case; the motion was indefinite as to its purpose; the names of no witnesses were given, nor was the character of the testimony desired stated to the committee. It appeared from the record made in the case and the statements of counsel that the contestee had notice of the fact that his seat would be contested as far back as November 18, 1890, at which

time he was notified to appear to take testimony to be used in the contest. It appeared further that the contestee had regularly attended the sittings before the mayor; that ample opportunity was given at that time not only to cross-examine and by every means test the validity and reliability of the testimony upon which this report is founded, but that frequent adjournments were granted at his request on the motion of his counsel, and that he failed when the subject was fresh in the minds of all concerned, to collect and prepare such testimony for his defense as he might see fit to rely on; that he took adjournments from time to time, and several adjournments were granted him after the contestant had closed his case and he had full opportunity to present his evidence at that time.

On the first day of this session of the Legislature a memorial was presented in this case to the House, which was an additional notice to the contestee that his seat was to be contested, and he having been fully notified and having waived his fair and reasonable opportunities to secure and present evidence if he felt so inclined, and on the indefinite character of his request for further postponement, which to a majority of the committee seemed intended to delay the case unfairly and without regard to the rights of the contestant, the committee voted to deny his motion for further time and proceeded to instruct the chairman to report in accordance with the facts above stated.

Members of your committee who were present at the last Legislature have a distinct recollection of the arguments used in favor of the passage of the law in violation of which the crimes charged were perpetrated. Whatever may have been the views of the different members of the last Legislature, it should be the unanimous opinion of this body that the law so earnestly urged and so warmly discussed at the time of its adoption should, since it has become the law of the land, be enforced with strictness, certainty and impartiality.

Your committee believe that it is the plain and bounden duty of the United States district attorney of the district in which Montgomery county is situate and of the district attorney of that county to investigate, before the grand jury, the conspiracy so plainly disclosed by the evidence in this proceeding, to the end that the purity of the ballot-box may be maintained and the guilty punished.

Your committee find and report that John F. Dwyer was duly elected a member of the Assembly from the county of Montgomery and should have received the certificate of election instead of W. Barlow Dunlap, and recommend the adoption of the following resolution:

Resolved, That John F. Dwyer was at the last general election elected to the Assembly from Montgomery county, New York, which seat is now held by W. Barlow Dunlap; and the said John F. Dwyer is hereby awarded the same.

All of which is respectfully submitted,

GEORGE P. WEBSTER,
MATT. ENDRES,
JAMES H. SOUTHWORTH,
JOHN J. O'CONNOR,
JAMES M. RILEY,
JOHN T. GORMAN.

The undersigned members of the committee on privileges and elections dissent from the foregoing report.

WILLIAM C. STEVENS,
JAMES H. PIERSON,
E. H. DAVIS.

Dated, *February* 17, 1891.

MINORITY REPORT.

To the Assembly:

The undersigned of the committee on privileges and elections, to which was referred the petition of John F. Dwyer, asserting

that he was legally elected a member of Assembly from the county of Montgomery, instead of W. Barlow Dunlap, who received the certificate of election from the board of county canvassers of said county and is now occupying a seat in this body as the member of Assembly for said county of Montgomery, respectfully report that on the 18th day of November, 1890, John F. Dwyer commenced a proceeding under the provisions of the Revised Statutes of this State, before the mayor of the city of Amsterdam, N. Y., to take evidence in an intended contest for the seat in this body now held by W. Barlow Dunlap; that the mayor of said city continued to take evidence on the part of the contestant from that date until and including December 29, 1890, when the hearing was adjourned until January 5, 1891; that on the 5th day of January, 1891, the mayor of said city transmitted the evidence so taken to this body and closed the case before him; that an actual notice of contest was filed by the contestant with this body on the day it organized, January 6, 1891, and on that day the present committee on privileges and elections was duly appointed by the Speaker and the case sent to that committee for consideration; that the evidence of the contestant was presented to this body on the first day of the present session of the Legislature, but that only a part of it has been printed and placed on the files of the members of this House, and that no evidence has been given on the part of the sitting member, Mr. Dunlap, neither has he had opportunity to present his case before either the mayor of the city of Amsterdam or before your committee; and that the committee has never had a meeting to transact any business, except to order the contestant's evidence printed, until the afternoon of February 10th, at which no business was transacted except to appoint a hearing of the case at 7.30 P. M., February 12th.

On February 12th the sitting member, Mr. Dunlap, appeared in person before the committee and by M. L. Stover, his counsel, who announced that he desired to present the evidence of

the sitting member, and requested that he be given a reasonable time of not more than a week in which to produce his witnesses and present his evidence.

The majority of your committee refused to allow the sitting member an opportunity to present his evidence and refused adjournment that his witnesses might be produced, and insisted that the case should then and there be disposed of.

The counsel for the sitting member then asked the committee that if the case was to be at once disposed of, the documentary evidence offered before the mayor and referred to in the printed case be produced, that counsel might intelligently present the matter to the committee, that they might form a correct idea of the contest.

The committee declared the case closed and refused to produce the evidence called for, although it appears by the printed case that more than 250 pieces of documentary evidence were offered and received in evidence, not one of which was before the committee or was produced by them.

The counsel for the sitting member then announced to the committee that if they would not allow him to produce his evidence and would not produce the evidence offered by the contestant, he would be obliged to let the case rest where it was.

The committee, without having an opportunity to examine all of the evidence, and without discussing any portion of it, decided by a vote of the majority members of the committee to report in favor of unseating Mr. Dunlap and seating the contestant Dwyer.

By the action of the committee in refusing to allow Mr. Dunlap an opportunity to present his side of the case, and the refusal of the committee to have all the evidence taken before the mayor presented, and the undue haste of the majority of the committee in deciding to report in favor of unseating Mr. Dunlap within an hour of the first meeting of this committee at which the parties appeared, and without any consideration of that portion of the evidence before them, it is shown that the committee did not give

the matter that calm judicial hearing recommended in the messages of the Governor in 1890 and 1891 and consistent with the Constitution of this State.

No claim is anywhere made that the sitting member, Mr. Dunlap, contributed any money to influence a vote, nor is he connected, directly or indirectly, with a single one of the irregularities alleged; and we assert that the contestant, even with his *ex parte* evidence, has completely failed to make out a case against the respondent.

Adopting the view most favorable to the contestant and assuming the evidence given on his behalf to be true, the contestant has not only shown that twenty-two illegal votes were cast, and of this number three were cast for the contestant; but if the entire number of illegal votes are deducted from the majority of the sitting member he still has 116 majority.

The respondent has been deprived arbitrarily and in a manner without precedent of his right to be heard in his own defense, which we denounce as an outrageous proceeding on the part of the majority of your committee.

We, therefore, protest against such unfair and high-handed action and submit the following:

Resolved, That John F. Dwyer is not entitled to the seat now held by W. Barlow Dunlap, as member of Assembly from Montgomery county.

WILLIAM C. STEVENS.

JAMES H. PIERSON.

E. H. DAVIS.

WEDNESDAY, *February* 25, 1891.

Mr. Speaker announced the special order of the day, being the consideration of the report of the committee on privileges and elections in the matter of the petition of John F. Dwyer, contesting the seat now occupied by W. Barlow Dunlap, of the county of Montgomery, as set forth in the Assembly Document No. 41.

The question recurring upon agreeing with the report of the committee and the adoption of the following resolution:

Resolved, That John F. Dwyer was at the last general election elected to the Assembly from Montgomery county, N. Y., which seat is now held by W. Barlow Dunlap; and the said John F. Dwyer is hereby awarded the same.

All of which is respectfully submitted.

GEORGE P. WEBSTER.

MATT. ENDRES.

JAMES J. SOUTHWORTH.

JOHN J. O'CONNOR.

JAMES H. RILEY.

JOHN T. GORMAN.

Mr. W. C. Stevens moved to amend by substituting the minority report, a part of which is as follows:

Resolved, That John F. Dwyer is not entitled to the seat now held by W. Barlow Dunlap as Member of Assembly from Montgomery county.

WILLIAM C. STEVENS.

JAMES H. PIERSON.

E. H. DAVIS.

Assembly Journal, 114th Session, 1891.

Case of William B. Howard and Nevada N. Stranahan.

IN ASSEMBLY, FRIDAY, *January 23, 1891.*

Mr. Webster, from the committee on privileges and elections, reported the evidence and proceedings heretofore taken before the recorder of the city of Oswego, in the matter of the contest of William B. Howard against Nevada N. Stranahan for the office of member of Assembly for the first district of Oswego county; which was ordered printed, and when printed to be recommitted to the committee on privileges and elections.

The evidence and proceedings were printed and recommitted, but the committee never reported on the same. The evidence taken before the recorder will be found in Assembly Document No. 40, 1891.

Assembly Journal, 114th Session, 1891.

Case of Francis H. Reinhard and Joseph Aspinwall.

IN ASSEMBLY, THURSDAY, *April 16*, 1891.

Mr. Webster, from the committee on privileges and elections, made the following report:

To the Assembly:

The committee on privileges and elections, to which was referred the petition of Francis H. Reinhard, of the eleventh district of Kings county, State of New York, claiming that he was duly elected to the office of Assemblyman from the eleventh district of that county at the last general election, held on the 4th day of November, 1890, and that he is entitled to the seat in this body now held by Joseph Aspinwall, respectfully report:

That the sub-committee appointed to hear the parties and take testimony, held their sittings in the city of Brooklyn, county of Kings, at different times, according to the conveniences of the parties and witnesses.

That both contestant and contestee appeared before the committee and were also represented by counsel, and were present at the several sittings of the committee.

That the parties to the proceeding were duly heard; that witnesses were sworn and examined; the evidence of which is submitted herewith.

Your committee further report that, though the contestant asks for further hearing, and by his counsel claims he could, with further opportunity, establish his claim to the seat in controversy; but there having been much delay in the progress of the case, and the session being much advanced, and the evidence already pro-

duced being regarded as insufficient or unsatisfactory, the committee decided to close the case.

Your committee further report, on all the proceedings taken, that the contestee and sitting member, Hon. Joseph Aspinwall, is entitled to the seat now held by him as member of Assembly for the eleventh district, county of Kings, for the year 1891, and recommend the adoption of the following resolution:

Resolved, That Hon. Joseph Aspinwall is entitled to hold the seat now occupied by him in the Assembly of the State of New York, as the representative from the eleventh district of Kings county.

All of which is respectfully submitted.

GEO. P. WEBSTER.

JAMES M. RILEY.

JOHN J. O'CONNOR.

MATTHIAS ENDRES.

WILLIAM C. STEVENS.

JAMES H. PIERSON.

JOHN T. GORMAN.

Which report was agreed to.

Assembly Journal, 114th Session, 1891.

Case of Henry L. Warner and Aaron B. Gardenier.

IN ASSEMBLY, THURSDAY, *April* 16, 1891.

Mr. Webster, from the committee on privileges and elections, reported the following:

To the Assembly:

The committee on privileges and elections, to whom was referred the petition of Henry L. Warner, of Columbia county, State of New York, claiming that he was elected to the office of Assemblyman from said county at the last general election held on the 4th day of November, 1890, and that he is entitled to the seat in this body now held by Aaron B. Gardenier, respectfully report:

That the committee held their sittings in the Capitol, at Albany, from time to time, the contestant having been duly notified to appear and present his case and the evidence to sustain the allegations in his petition.

That the contestant not having presented his case nor signified his intention to do so, and there having been much delay, and the session being far advanced, the committee decided to close the case.

Your committee further report that the contestee and sitting member, Aaron B. Gardenier, is entitled to the seat now held by him as member of Assembly from the county of Columbia, State of New York, and recommend the adoption of the following resolution:

Resolved, That the Hon. Aaron B. Gardenier is entitled to the seat now held by him in the Assembly of the State of New York, as the representative from Columbia county, State of New York.

All of which is respectfully submitted.

GEORGE P. WEBSTER.
JAMES M. RILEY.
JOHN J. O'CONNOR.
MATTHIAS ENDRES.
WILLIAM C. STEVENS.
JAMES H. PIERSON.
JOHN T. GORMAN.

Which report was agreed to.

Assembly Journal, 114th Session, 1891.

Case of George H. Bush and James Lounsbury.

IN ASSEMBLY, TUESDAY, *January 3, 1893.*

Mr. Webster presented the testimony taken before Hon. Alton B. Parker, Justice of the Supreme Court, in the matter of the intended contest of George H. Bush, contestant, against James Lounsbury, for the office of member of Assembly from the second district of Ulster county.

On motion of Mr. Webster, said testimony was ordered printed and referred to the committee on privileges and elections, when appointed.

See Doc. No. 16.

WEDNESDAY, *April 19, 1893.*

Mr. O'Sullivan, from the committee on privileges and elections, presented the following report:

To the Honorable, the Legislature of the State of New York:

The committee on privileges and elections, to which was referred the petition of George H. Bush, of Ellenville, Ulster county, N. Y., claiming that he was duly elected to the office of Assemblyman from the second district of the county of Ulster, at the last general election held November 8, 1892, and that he is justly and lawfully entitled to the seat in this body, now held by James Lounsbury, respectfully report as follows:

The committee find that, pursuant to the provisions of section 64, chapter 682, of the Laws of 1892 (the Legislative Law), evidence had been taken before Hon. S. L. Mayham and Hon. Alton B. Parker, Justices of the Supreme Court of the State of New York, upon notice duly served upon the contestee, contestant and contestee both being present and both being represented by counsel; that when such testimony was taken, a number of witnesses were examined before said judges, and were ably and thoroughly examined and cross-examined by counsel for contestant and contestee; that the testimony so taken comprises more than two hundred typewritten pages, which, together with the alleged marked and illegal ballots, show and establish conclusively the allegations set forth in the petition of the contestant.

From the testimony taken before Judges Mayham and Parker, and the marked ballots attached thereto and the testimony subsequently taken before the committee, both contestant and contestee being present and represented by counsel, the committee find and report as follows:

First. That on Monday, November 7, 1892, the day preceding the general election of that year, at the house of one Josiah Hasbrouck, Jr., at Port Ewen, town of Esopus, Ulster county, N. Y., the said Josiah Hasbrouck, Jr., a member of the republican county committee, and Anthony Maley and others entered into a conspiracy to defraud the nominees of the democratic party by offering illegal and corrupting inducements to the voters of the first and second election districts and inducing said voters to vote certain ballots marked for identification and which, said voters were informed, were so marked.

Second. That, pursuant to said conspiracy, the said Hasbrouck and the said Maley prepared a large number of full republican paster ballots and placed thereon the individual paster ballot of one William Luby, which said Luby paster was cut at a sharp angle on the right side for the purpose of identifying the ballots so prepared.

Third. That said Hasbrouck notified the republican inspectors in the first and second election districts that he had prepared ballots of the description set forth above and asked that said republican inspectors to ascertain how many ballots of that kind were found when the votes were canvassed in the first and second districts of the town of Esopus.

Fourth. That said Maley, under the instructions of said Hasbrouck, delivered fifty or sixty of said marked ballots to the voters of the first and second districts of the town of Esopus, and at the time of delivering said ballots to said voters informed them that said ballots had been marked for identification and then entered into a corrupt and illegal bargain with said voters to vote said marked ballots, and at the same time notified the voters to whom said ballots were delivered that if the marked ballots did not appear in the canvass of the votes they would not be paid the amount agreed upon.

Fifth. That seventeen of said ballots so marked for identification were cast in the first election district of the town of Esopus, and

that each of said ballots contained the name of James Lounsbury, the sitting member, and were counted for and credited to said Lounsbury by the inspectors of election in the said district and by them returned in the certificate of canvass which were canvassed by the board of county canvassers of Ulster county and went to make up Lounsbury's majority of twenty-one in the Assembly district.

Sixth. That eleven of said ballots, so marked for identification, were cast in the second election district of the town of Esopus, and that each of said ballots contained the name of James Lounsbury, the sitting member, and were counted for and credited to said Lounsbury and included in the certificate of canvass which were canvassed by the board of county canvassers of Ulster county and included in the majority of Lounsbury, which was twenty-one in the second Assembly district of Ulster.

Seventh. That said marked and illegal ballots so cast and counted for Lounsbury amount to twenty-eight.

Eighth. The foregoing facts are conclusively established by the testimony of Anthony Maley (a republican constable of the town of Esopus, who helped to prepare the ballots marked for identification), Jeremiah Houghtaling (republican inspector of the first district of Esopus), Henry E. McKensie, William Luby, Robt. H. Fairweather, Wm. J. Kean (who was subpoenaed by the contestee), and especially by the identical ballots marked, which were before the committee.

Ninth. We find that the contestee has failed absolutely to make any defense either by way of denial or avoidance to the allegations and proofs of the contestant.

It appears by the official canvass made by the board of county canvassers of the county of Ulster, that the contestee received five thousand and fifty-four (5,054) votes, and that the contestant received five thousand and thirty-three (5,033) votes, giving the contestee an apparent majority of twenty-one. From the vote of the contestee there should be deducted the twenty-eight ballots,

which were and are fraudulent and illegal, leaving a legal majority in favor of the contestant of seven.

Your committee find and report that George H. Bush was duly elected a member of Assembly from the second district of the county of Ulster and should have received the certificate of election instead of James Lounsbury, and recommend the adoption of the following resolution:

Resolved, That George H. Bush was, at the last general election elected to the Assembly from the second district, of Ulster county, N. Y., which seat is now held by James Lounsbury; and that said George H. Bush is hereby awarded the same.

All of which is respectfully submitted.

T. C. O'SULLIVAN.
 CORNELIUS HALEY.
 JOHN J. CASSIN.
 THOMAS FINEGAN.
 J. W. COONEY.
 WM. H. WALKER.

Mr. Buck, from the committee on privileges and elections, presented the following minority report:

To the Honorable, the Legislature of the State of New York:

We, the minority members of the committee on privileges and elections, to which was referred the petition of George H. Bush, of Ellenville, Ulster county, New York, claiming that he was duly elected to the office of Assemblyman from the second Assembly district of that county, at the last general election held on the 7th day of November, 1892, and that he is entitled to the seat in this body now held by James Lounsbury, respectfully report as follows:

1. That it appears from the lawful returns duly made and filed with the proper officers of Ulster county, in evidence before this committee, and from the certificate of the board of canvassers of the county of Ulster, that James Lounsbury in said Second As-

sembly district of Ulster county, received a plurality of the votes cast at said election over George H. Bush, his opponent, of twenty-one.

2. That the claim of the contestant is based upon the alleged finding of seventeen ballots in the ballot-box used at election district No. 1, of the town of Esopus, and of eleven ballots in the ballot-box used at election district No. 2, of said town, on the night of the third day after election, which are claimed by the contestant to have been marked for the purposes of identification.

There does not appear in the evidence a single particle of testimony that any ballot marked, as claimed by the contestant, was voted by any elector. Nor that any elector had any knowledge that the ballot voted by him had been marked in any way for identification.

It does appear that no inspector, election officer or watcher, during the canvass or immediately thereafter objected to any ballot as marked for identification.

It further appears from the testimony that one democratic inspector of election and one republican inspector and watcher in district No. 2, saw no such marked ballots during the canvass or the election and that one republican inspector and watcher at district No. 1, and one democratic inspector of election, saw no such marked ballots during the canvass and election at district No. 1.

It further appears that the testimony upon which the contestant Bush relies, in the main, is a traitor and political spy whose neighbors, democratic and republican, have united in testifying before this committee that his reputation for truth and veracity in the community where he lives is bad and that they would not believe him under oath.

That upon election night the election officers failed to destroy the ballots voted forthwith as required by the election laws of 1892, but left and abandoned them, the ballots used at district No. 1, at the Pythian Hall, in said town, and the ballots used at district No. 2, at the public house of Margaret Van Wagonen.

That the ballots so left and abandoned, passed from the custody of the law, and their integrity as evidence became challenged, and rendered nugatory.

If ballots which have passed from public custody and gone into the hands of private persons can be afterwards, without the oath of the voter, received as evidence in any judicial tribunal, then no election is safe.

If inspectors of election shall be permitted to defy the election law and refuse to destroy or take private possession of the public ballot, of what use are elections to be? We might as well say, "You take the voice of public opinion as expressed at the polls, but give us the inspectors and the ballot-boxes."

The alleged marked ballots here are said to be marked because the paster of the democratic coroner on a republican paster ballot is cut on the bias. Any one may well see that it was perfectly easy for Inspectors of Elections McKenzie and Fairbrother to take from the ballot-box straight republican pasters and then paste Lubey's paster cut on the bias on the same.

These alleged marked ballots could have been very easily made after the election without fear of detection. All that there would be needed would be to get the ballots voted and the Lubey paster cut on the bias and the work would be done. This fraud was so tempting in this case, and hereafter would furnish means so effective and hidden to steal a public office, that we are compelled from motives of public policy and public welfare to declare that the alleged marked ballots unobjected to during the canvass nor immediately after and unpreserved by safeguards prescribed by law and claimed to have been preserved in defiance of law, are not evidence.

Such a ruling on the part of your committee has the sanction of the highest court of this State from the lips of that able and conscientious judge and stalwart democrat, Sanford E. Church, who says: "The liabilities of tampering and fraud doubtless induced the Legislature to require their destruction. If, however, the ballots have not been kept as required by law and surrounded

by such securities as the law prescribed with a view to their safe preservation, as the best evidence of the election, it would seem that they should not be received in evidence at all." (People ex rel. Daily v. Livingston, 79 N. Y. 287.)

Again it was said by a learned justice of the Supreme Court of the State: "The ballots may be marked by the adverse party for the very purpose of having them rejected. Dishonest election officers may mark them to afterward reject them.

"Such a construction would place our elections completely in the hands of the innumerable boards of the inspectors of the State." (People ex rel. Budley v. Shaw, 19 N. Y. Sup. 303; see also, Newton v. Newell, 26 Minn. 529, and the leading case of People v. Cicott, 16 Mich. 482.)

The learned special term in the case of The People ex rel. Bush v. Lounsbury, 20 N. Y. Supp., said of leaving the ballots in such places:

"The danger of such action is obvious, strangers could obtain possession of them, tamper with them, mutilate or mark them. Ballots not objected to at the time of being canvassed, preserved in violation of law; out of the possession of the officers, exposed to the dangers I have suggested, I do not think should here be attached to the statement of the canvass."

And we, therefore, conclude as has been the uniform practice in legislative contests, where claims were predicated upon ballots whose integrity was challenged, tainted and defiled, to prefer the returns filed by the inspectors of election and the certificate of the board of county canvassers, to the evidence of the contestant. (Butler v. Lehman, 2 Cong. El. Cas. 353; Kline v. Verrie, id. 381.)

To eject an associate from his seat in your august body, upon such evidence — ballots coming from private custody — tainted and defiled — would be to establish a precedent which will open the flood-gates of fraud and deluge public offices with impostors and usurpers, and inflict an irreparable injury on the public, and an unremediless wrong upon the contestee.

Upon the merits we find from the testimony of William Luby, the democratic leader in charge of the polls at election districts Nos. 1 and 2, at Port Ewen, that he had fifty or sixty green tickets, like the specimen hereto annexed:

Name: Thomas McDonald,

From Newburgh and return.

Fare, \$3.

Wm. Luby.

And that he gave and handed such green tickets to each of twenty-five or thirty voters at either or both of said Port Ewen polls in the second Assembly district of Ulster county, and among others to William Fox, Thomas McDonald, Robert Wright, Michael Malia, John Malia, Patrick Gibbons, and Louis Lifer and Joseph Lifer on election day. That such green tickets were all to be redeemed and redeemable in cash at the rooms of the Kennedy Gun Squad, in the Kennedy building, at Rondout, city of Kingston, N. Y., a place about one mile distant from the said polls and that the said green tickets so given, paid or loaned by the said Luby to the said twenty-five or thirty voters, among the rest Thomas McDonald and others, were a valuable consideration and money paid, loaned, contributed and promised to said voters to induce said voters and each of them, to come to the polls and on account of such voters having voted and having come to the polls at such election. That on said day, at said polls, the said twenty-five or thirty voters under the circumstances set forth, did actually vote the democratic ticket and George H. Bush in particular. And that on said day at said Kennedy building, the said Luby to the said twenty-five or thirty voters, among the Roach, or other person or persons, to your committee unknown, divers sums of money unknown to your committee, to come to the polls, for having voted and having come to the polls at such election.

That such conduct upon the part of said Luby and the said William Fox, Robert Wright, Patrick Gibbons, and divers other persons was prohibited by sections 41p and 41q, of chapter 693 of

the Laws of 1893, and that said twenty-five or thirty votes and each and every of them were and are absolutely void.

That the contestee undertook upon the examination before your committee, to prove by Bernard Roach, the paymaster at the Kennedy building, at Rondout, on election day, the payment of money to the said twenty-five or thirty voters, and each of them, and he declined to answer upon the constitutional ground that his answer might tend to degrade or incriminate him. So also the contestee produced William Fox, who declined to answer whether he had received any money, upon the same ground. The other witnesses whom Luby swore he had given these "beautiful green checks" to, the sergeant-at-arms could not (?) find.

Were it possible to concede the existence of the twenty-seven marked ballots and the fact that they were actually voted at the place aforesaid on election day. Yet with at least twenty-five votes, so rendered void as aforesaid, we are compelled to conclude under any circumstances, that Lounsbury has a substantial plurality of at least eighteen votes, over the said George H. Bush.

We, therefore, find and report that James Lounsbury was duly elected member of Assembly from the second district of Ulster county, and holds the just title and legal certificate of election thereto, and we recommend the adoption of the following resolution:

Resolved, That George H. Bush is not entitled to the seat now held by James Lounsbury, as member of Assembly from the second district of Ulster country.

HERMAN E. BUCK,
M. M. CONGDON,
W. H. DENNISTON.

Mr. Speaker presented the following communication:

ALBANY, April 19, 1893.

HON. WILLIAM SULZER, *Speaker of the Assembly, State of New York*:

Sir.— On or about January 6, 1893, I caused to be presented to the Assembly a petition alleging that at the last election for

member of Assembly for the second district of Ulster county, certain ballots marked for identification contrary to law, had been voted and counted for James Lounsbury, the sitting member for said district, and praying that the Assembly might make an investigation of the said allegations and that if it were ascertained upon investigation that a plurality of the votes lawfully cast at said election were cast for me that I might be awarded the seat in the Assembly now held by said James Lounsbury. I have just been informed that a committee of the Assembly has completed an investigation of the facts and circumstances attending said election and has agreed upon a report whereby it finds that at said election for member of Assembly for the second district of Ulster county, a majority of the votes lawfully cast for member of Assembly were cast for me and recommends the adoption of a resolution declaring that I am entitled to the seat now occupied by said James Lounsbury.

In making the contest for the seat now held by Mr. Lounsbury, I had no other purpose in view than that of promoting the purity of elections in Ulster county. The contest has been long and arduous and the report which has been agreed upon by the majority of the committee on privileges and elections after a full and complete investigation of the facts is a sufficient vindication of my action in making this contest and as the adoption of the report at this late day, the Legislature having decided to adjourn sine die, to-morrow at noon — could serve no other purpose than to give me the salary for the session and the expenses of making this contest. I hereby request that no further steps be taken in the matter, and do hereby withdraw from the contest. I sought a vindication only and not compensation for services not rendered.

Respectfully,

GEO. H. BUSH.

Said reports and communications were laid upon the table and ordered printed. (See Doc. No. 89.)

Assembly Journal, 116th Session, 1893.

Case of Albert W. Baillie and Samuel J. Foley.

IN ASSEMBLY, TUESDAY, *January 2*, 1894.

Mr. Sheffield presented the petition of Albert W. Baillie, contesting the seat now held by Samuel J. Foley, as member of Assembly for the fifth district of New York county; which was referred to the committee on privileges and elections.

THURSDAY, *February 15*, 1894.

Mr. J. F. Terry, from the committee on privileges and elections submitted the following report:

In the matter of the contest of A. W. Baillie, for the seat in the Assembly, to which the Honorable Samuel J. Foley was elected, and now occupies, as member of Assembly for the fifth district, New York county.

To the Honorable, the Assembly of the State of New York:

Your committee on privileges and elections, to whom was referred the above-entitled matter, respectfully reports:

That it has considered the said matter, and been attended therein by the said contestant, A. W. Baillie, who appeared in person and by Lucas L. Van Allen, Esq., his attorney, and by the contestee, the Honorable Samuel J. Foley, sitting member, who appeared in person, and by Holcomb & Martin, Esquires, his attorneys.

That it was proven before your committee that in a certain proceeding, entered upon under the Constitution and by the legislative authority of what is known as the consolidation act, being chapter 410 of the Laws of 1882, and which proceeding immediately concerned one of the streets of the city of New York, to-wit: One Hundred and Forty-fourth street, and was an exercise by the people of the State, of their power of eminent domain, the Supreme Court of the State of New York appointed the sitting member, the Honorable Samuel J. Foley, a commissioner of estimate and assessment, for the purpose of estimating and assessing and determining the compensation which should be made for

the private property taken for that public use in the manner prescribed by the said consolidation act.

That it was proven before your committee that Mr. Foley accepted the said appointment, and discharged the duties thereof, and that he was engaged therein within 100 days previous to the last general election.

That the said commissionership of Mr. Foley is not, nor was, an office under the city government of the city of New York.

That the Honorable Samuel J. Foley, the contestee in this matter, is the sitting member under a valid and effectual certificate of election, as member of your honorable body, the Assembly of the State of New York for the fifth Assembly district of the city and county of New York, and that he was not, at the time of his election, which took place at the last general election held in this State, to-wit: the 7th day of November, 1893, ineligible to the Legislature, but was eligible thereto, and that he was not then at the time of his election, nor had been, within one hundred days previous thereto, an officer under the government of the city of New York, as alleged by the contestant in this matter, or under any city government.

And your committee reports the following resolution in this matter, and recommends that the same be adopted by your honorable body:

Resolved, That the Hon. Samuel J. Foley, the sitting member of Assembly for the fifth Assembly district of the city and county of New York, is entitled to his seat in the Assembly of the State of New York, as member of Assembly for the said fifth Assembly district of the city and county of New York.

All of which is submitted respectfully.

GEO. S. HORTON,
J. F. TERRY,
HENRY McNAMEE,
VICTOR J. DOWLING,
JNO. C. HARRIGAN,

Committee.

Dated February 15, 1894.

Mr. Speaker put the question whether the House would agree to said report, and it was determined in the affirmative, a majority of all the members elected to the Assembly voting in favor thereof.

Ayes, 113. Noes, 0.

Assembly Journal, 117th Session, 1894.

Case of Frank Bloomingdale and William Lasch.

IN ASSEMBLY, TUESDAY, *January 2, 1894.*

Mr. Ainsworth presented the petition of Frank Bloomingdale, contesting the seat occupied by Wm. Lasch, as member of Assembly for the first district of Albany county, which was referred to the committee on privileges and elections.

TUESDAY, *February 6, 1894.*

Mr. Horton, from the committee on privileges and elections, submitted the following report:

To the Honorable, the Legislature of the State of New York:

The committee on privileges and elections, to which was referred the memorial of Frank Bloomingdale, claiming the seat now occupied by William Lasch, as member from the first Assembly district of the county of Albany, respectfully report:

That upon due notice the parties appeared before the committee at the Assembly parlor on the 1st day of February, 1894, at 10 o'clock in the forenoon. The contestant, Frank Bloomingdale, appeared by his attorney, Hon. Walter E. Ward, and the contestee, William Lasch, by his attorney, Hon. Galen R. Hitt. That the said Hon. Walter E. Ward, as attorney for the said contestant, withdrew from the contest, and asked and requested that the seat be awarded to the said William Lasch. And your committee, therefore, recommend the adoption of the following resolution:

Resolved, That the sitting member is the lawfully-elected representative from the first Assembly district of Albany county, and that he is entitled to retain his seat in the Assembly as such representative.

Date at ALBANY, N. Y., *February 6, 1894.*

GEORGE S. HORTON,
JAMES R. SHEFFIELD,
VICTOR J. DOWLING,
EUGENE F. VACHERON,
HENRY McNAMEE,
Committee.

Mr. Speaker put the question whether the House would agree to said report, and it was determined in the affirmative.

Ayes, 94. Noes, 0.

Assembly Journal, 117th Session, 1894.

Case of Thomas W. Campbell and Joseph F. Loonan.

IN ASSEMBLY, TUESDAY, *January 2, 1894.*

Mr. Taylor presented the petition of Thos. W. Campbell, contesting the seat occupied by Joseph F. Loonan, as member of Assembly for the twelfth district of the county of Kings; which was referred to the committee on privileges and elections.

FRIDAY, *April 20, 1894.*

Mr. Keck, from the committee on privileges and elections, presented the following report:

To the Honorable Assembly of the State of New York:

Your committee on privileges and elections present the following report in the matter of the contest for a seat in this Assembly from the twelfth district of Kings county, between Thomas W. Campbell, contestant, and Joseph F. Loonan, contestee.

Your committee, after organization, appointed Mr. Philip Keck,

chairman, Wesley Gould and John Harrigan a subcommittee, to make the investigations herein. They attended the several hearings in the city of Brooklyn, both parties appearing with counsel, and heard the evidence presented by both parties, which evidence is on file, and to which the committee here make reference: Stephen H. Hoyer, Esq., attorney-at-law, appeared for the contestant, and Thomas F. Magner, Esq., attorney-at-law, appeared for the contestee. After fully considering the evidence offered by the respective parties, your committee recommend that the petition of the contestant be dismissed, for the reason that no sufficient, proper and legal evidence has been presented by the contestant to warrant favorable action thereon; and your committee further recommend that the contestee, Joseph F. Loonan, be declared entitled to hold his seat in this body as the regular representative for the twelfth Assembly district of the county of Kings.

All of which is respectfully submitted.

E. F. VACHERON,
PHILIP KECK,
JAMES R. SHEFFIELD,
J. F. TERRY,
JNO. C. HARRIGAN,
VICTOR J. DOWLING,
HENRY McNAMEE,
WESLEY GOULD.

Mr. Speaker put the question whether the House would agree to said report, and it was determined in the affirmative.

Assembly Journal, 117th Session, 1894.

Case of Michael Conklin and Michael Maguire.

IN ASSEMBLY, TUESDAY, *January 2, 1894.*

Mr. Taylor presented the petition of Michael Conklin, contesting the seat occupied by Michael Maguire as member of Assembly for Richmond county.

TUESDAY, *January 9, 1894.*

Mr. Speaker presented the testimony taken before Hon. Edgar M. Cullen, Justice of the Supreme Court, in the matter of the intended contest of Michael Conklin, contestant, against Michael McGuire, for the office of member of Assembly for Richmond county; which was referred to the committee on privileges and elections.

MONDAY, *February 5, 1894.*

Mr. J. F. Terry presented the evidence taken by the committee on privileges and elections in the matter of the contest of Michael Conklin, claiming the seat now occupied by Michael Maguire, which was laid upon the table and ordered printed.

(See Document, 1894.)

MONDAY, *March 26, 1894.*

Mr. Horton presented the majority report in the matter of the contested seat of Conklin v. Maguire.

Mr. Dowling presented the minority report in the same case. Said reports were laid upon the table and ordered printed.

WEDNESDAY, *April 4, 1894.*

Mr. Sulzer moved that the report of the committee on privileges and elections on the case of Michael Conklin v. Michael Maguire be postponed until to-morrow morning at 10 o'clock.

Mr. Speaker put the question whether the House would agree to said motion, and it was determined in the negative.

WEDNESDAY, *April 4, 1894.*

Mr. Speaker announced the further special order, being the majority and minority reports of the committee on privileges and elections relative to the petition of Michael Conklin, claiming the seat in the Assembly, from Richmond county, now occupied by Michael Maguire, in the words following:

MAJORITY REPORT.

To the Assembly of the State of New York:

Your committee on privileges and elections, to which was referred the petition of Michael Conklin, of the county of Richmond, claiming that he was duly elected to the office of Assemblyman from that county at the last general election, held on the 7th day of November, 1893, and that he is entitled to the seat in this body now held by Michael Maguire, respectfully report as follows:

That the testimony was taken in this proceeding under section 64 of the Election Law, before the Hon. Edgar M. Cullen, Justice of the Supreme Court for the second judicial district, on notice served by the contestant upon the contestee; that both of the parties were present before the said justice and were represented by counsel; that fifty-seven witnesses were examined on the part of the contestant and cross-examined by counsel for the contestee before said justice, and that the testimony so taken was remitted to the Assembly, and by order was printed and referred to the committee. Such testimony constitutes Assembly document number fifteen of this session.

In addition to the testimony so taken before Mr. Justice Cullen, a subcommittee of the committee on privileges and elections, composed of Mr. J. F. Terry, chairman, and Messrs. Eugene F. Vacheron and Henry McNamee, sitting at the village hall, in the village of New Brighton, in the county of Richmond, took further testimony and heard arguments in the proceeding; that the sessions of said subcommittee for that purpose began on the 18th day of January, and were continued from week to week until the 8th day of February, 1894. That upwards of 100 witnesses were examined on the part of the contestant and contestee, and the testimony has been duly presented to this honorable body, and has, by order, been printed and is known as Assembly Document No. 37 of this session.

The testimony in these proceedings related to four election districts only, of the county of Richmond, being the fifth, eighth and ninth election districts of the town of Castleton, and the fourth election district of the town of Southfield in said county. The records so presented furnishes a history of the most shameless, reckless and audacious fraud and violation of the Election and Penal laws and of the electoral franchise, rarely, if ever, equalled in the annals of election cases in this State. Indeed, the utter disregard of law, the flagrant and deliberate violations of the elective franchise and the contemptuous indifference to public opinion may well startle the people of this State and rouse them to the dangers which threaten their most sacred rights and privileges, and to take heed lest these be wholly lost and destroyed. These election frauds were directly participated in by high officials of the county of Richmond, notably by the county treasurer, and by the sheriff of the county.

The county of Richmond is composed of five towns, and at the recent election was divided into forty-two election districts. The total vote for the office of member of Assembly, as canvassed by the county board of canvassers, was as follows:

Michael McGuire	4,706
Michael Conklin	4,422
For other candidates	403
	<hr/>
Total	9,531
	<hr/> <hr/>

McGuire's plurality, on the face of the returns, over Conklin, was 284.

In the fifth, eighth and ninth election districts of Castleton, and in the fourth election district of Southfield, the vote was returned as follows:

Election District.	McGuire.	Conklin.
Fifth Castleton	182	72
Eighth Castleton	155	31
Ninth Castleton	252	20
Fourth Southfield	153	46
Totals	<u>742</u>	<u>174</u>

It thus appears that in the four election districts in question McGuire received 742 votes and Conklin 174.

In the thirty-eight remaining districts of the county the vote was as follows:

For McGuire	3,964
For Conklin	<u>1,248</u>

Conklin's majority over McGuire in thirty-eight districts being 284.

McGuire was the candidate of the so-called democracy of Richmond county; Conklin was the candidate of the regular republican organization and of the independent organization of Richmond county democrats. It is a matter of history that at the present election there was a general uprising of the people and disregard for party lines on the part of the democratic voters of the State, resulting in an enormous vote for the republican candidates. This upheaval was not limited to any county of the State, and Richmond county was equally affected. The normal democratic majority in this county has been from 1,500 to 2,000; the figures which we have given in relation to the vote for member of Assembly show the tremendous change; but the four election districts in question were not apparently affected, according to the returns, by this general revolution. They were unique not only in this respect, but they did not even return the normal republican vote.

The testimony taken in this investigation discloses the causes of this most astounding result, and presents a story of venality and corruption almost impossible of belief, and yet the contestee and his learned counsel in at least two of the election districts, namely, the eighth and ninth of Castleton, have not produced a single word of testimony in contradiction of the testimony in these respects presented by the contestant.

We will now proceed to present the facts found by us; and as, in our opinion, the fraud and corruption disclosed by the evidence relating to the fifth, eighth and ninth election districts of the town of Castleton, are in themselves a sufficient justification for the result which we have reached, we shall mainly in this report confine ourselves to a presentment of the facts relating to those districts, touching, however, in a general way upon the testimony in the fourth election district of Southfield.

THE EIGHTH AND NINTH ELECTION DISTRICTS OF THE TOWN OF CASTLETON.

In these two election districts is located the well-known charitable institution called "Sailors' Snug Harbor," a home for aged, decrepit and worn-out seamen. This institution is a private, charitable corporation, not receiving governmental aid, and not exempted from taxation. (Testimony of the governor of the institution, Gustavus D. S. Trask, Assem. Doc. No. 15, pp. 42, etc.)

Most of the voters in these two election districts are inmates of this institution; all of the election officers, including the inspectors, poll clerks and ballot clerks were also inmates. (Testimony of Trask.)

It appears by the testimony that the inmates come from all parts of the United States to the institution, and that they pay nothing for their support and maintenance; even their clothing being supplied to them. They have absolutely no interest as taxpayers or otherwise in the local government or affairs of the

community, and the great majority of them are utterly indifferent to the local and even State interests, and yet in a close election their vote may turn the balance in favor of one party or the other, and thereby change the government of the village, town and county, and even of the State and nation.

In 1891, in the eighth election district, the majority for the democratic candidate for Governor was 13; in 1892, the majority for the democratic electors was 45, and yet, in 1893, the majority returned for the democratic candidate for Assembly was 124.

In the ninth election district, in 1891, the majority for the democratic candidate for Governor was 51; in 1892 the majority for the democratic electors was 47, and yet, in 1893, according to the returns, the majority for the democratic candidate for Assembly was 232.

We now present the uncontradicted facts in relation to the

NINTH ELECTION DISTRICT OF THE TOWN OF CASTLETON.

At the close of the second day of registry, namely, October 28, 1893, the inspectors of election for this district, certified that they had registered 285 names of electors. The testimony showed that at least one, and probably two names were added on election day, and the persons allowed to vote. Inspectors of this district certified, in their statement of the result of the canvass, that (273) two hundred and seventy-three votes had been cast for all the candidates for each office, to be voted for at the election, of which 252 were credited to each democratic candidate for each office, twenty to each republican candidate for each office, and one to each prohibition candidate for each office. They did not return a single scratched ballot, although the testimony discloses that such ballots were cast.

The poll-lists kept by the poll clerks of this election district disclose the names of only (247) two hundred and forty-seven persons, of whom one is recorded as not voting, "Ballot spoiled;"

at least eight of the names on these lists are duplicated; that is, the persons bearing those names are recorded as voting twice, different ballot numbers, although their names are only registered once; at least five of the names appearing upon these poll-lists are not registered at all.

Twenty names appearing at the tops of different pages in each poll list are in a different handwriting from that of the two poll clerks. Both of these poll clerks have testified that these names were on the poll lists when they received them at the opening of the polls on election day; that they did not see the persons giving those names vote, and that they did not know in whose handwriting they were written. Investigation shows that these names included the names of persons who are unknown and of persons who have testified that they did not vote on that day. It includes the name of Alexander Freeman, a colored man, 105 years old, who had been an inmate of the hospital at Sailors' Snug Harbor for eleven years.

The highest ballot number on the poll list is No. 258; ten ballot numbers are not accounted for; two ballot numbers are duplicated. Numbers much higher numerically precede lower numbers. For instance, No. 37 precedes No. 31; No. 48 precedes No. 41; No. 29 precedes No. 3; Nos. 24 and 25 precede Nos. 6 and 7, etc.

Surnames having the same initial appear together with successive numerals. For instance, the names of Hazard, Houtman and Howard succeed each other, with the ballot numbers 147, 148 and 149 in succession opposite them. The names Hogarth and Healey succeed each other, with the ballot numbers 249 and 250 in succession opposite to them. The same peculiarity appears on the other pages of the poll lists, notably the names beginning with R, S, T, V and W. For instance, on the pages containing names in S, appear in succession opposite such names Nos. 212, 213, 214, 215. The testimony shows that the names appearing opposite these numbers were names of persons who are either unknown, or dead, or insane, or absent, or who did not vote on

election day. Mr. A. B. Hodges, the secretary of the Sailors' Snug Harbor, testified that fourteen of the names appearing on the poll lists were the names of men who had been inmates of the institution, but who were, at the time of the election, either dead, in the insane asylum or absent, seven being dead, one in the insane asylum and six absent (testimony of Hodges, Assembly Document, No. 15, p. 77, etc.); that the names of twenty-one others on these two poll lists, appearing as residents in Sailors' Snug Harbor, were absolutely unknown in that institution. Twenty inmates, whose names appear on the poll lists testified that they did not vote on election day. While the highest number on the poll lists was No. 258, the two poll clerks certified in the certificate required to be made by them at the close of the canvass, that they had distributed 278 sets of ballots, of which five sets had been returned to them spoiled, leaving 273 sets outstanding, which would correspond with the return of 273 votes cast, made by the inspectors. Five different kinds of official ballots were used in the election districts of Richmond county at this election. The ballot clerks returned to the office of the county clerk, as required by law, a sealed package containing the ballots not delivered by them to the voters. An examination of this sealed package, pursuant to an order of a justice of the Supreme Court, disclosed the fact that there were five sets of such returned ballots, and that each set was numbered from 258 to 800. (See testimony of Gaillard, Assembly Document, No. 15, p. 163, etc.) This testimony showed that the ballot clerks' certificate was also false.

The two poll clerks testified that the ballots were counted without comparing their number with the number of votes shown by the poll lists, and that no one person counted all of the votes cast; that no tally sheet was kept; that the inspector, poll clerks, and the democratic county treasurer, Matthew S. Tully, who was not an election official, participated in counting the ballots.

It thus appears that every election officer in this election dis-

trict deliberately took part in and aided and abetted the making of a false and fraudulent statement of the result of the canvass of the votes.

The testimony further discloses that the democratic county treasurer, Matthew S. Tully, with two or three young men as his aids, and with the connivance, aid and assistance of the inspectors of election and of the other election officials, and of the police officer at the polling place, actually took possession of the polling place and "ran" the election. While the poll lists disclose only the name of one person who was assisted, yet nearly two-thirds of the persons who have testified that they voted in this polling place on election day, about 100 in number, have testified that they were assisted without any oath being taken by them in a single instance. Not more than five of them were entitled to assistance, in any event, under the law. Most of them have testified that they did not ask for assistance; that Tully or one of his aids suggested such assistance to them; that these men, unbidden and unasked, forced their way into the voting booths with them and in some cases actually persisted in assisting them when their assistance was declined; in other cases the democratic ballot was thrust into the hands of the voter, and he voted the ticket without knowing its contents. In many cases it appeared clearly that the voters did not know what ballots they were voting; in other instances, if the voter desired to vote the republican ticket he was hampered, annoyed and interfered with by these volunteers and hurried from the voting booth. In several cases the voters had to force these men from the voting booths; and others voters who received assistance in the folding of their ballots were actually deceived by the person folding them as to the ballots to be voted, the assistant endeavoring to substitute a democratic ballot for the republican. There is not time for the narration of all the tricks, deception and frauds perpetrated on the voters at this polling place, not to say intimidation and undue influence, that were practiced. Many of the voters, while not being disabled so as to entitle them to assistance, were

men of advanced age, credulous and easily deceived; others cared little what they voted, and were ignorant of the candidates or the issues involved in the election; still others were open to pecuniary influences. The taking possession of the polling place by Tully and his confederates enabled them to ascertain who were republican voters, and exposed the voters not only to their animosity and revenge, but to intimidation and undue influence.

Mr. Tully, not content with his work during the polling hours, at the close of the polls ordered the inspectors to eject Mr. John De Morgan, a well-known resident of the neighborhood, who was duly appointed by the republican county committee as a watcher for the republican party at this polling place, and who wore a regular certificate of appointment and exhibited the same to the inspectors. The sole ground of Mr. Tully's objection was that Mr. De Morgan was not a republican, but a democrat. The inspectors obeyed his command, and had a police officer eject Mr. De Morgan from the polling place, and then had the door of the polling place closed and fastened, and policemen stationed at the door during the canvass of votes, although the canvass was required by law to be public. When Mr. De Morgan sought to return with his counsel the door of the polling place was opened by the police officer and then shut in his face, and he was unable to obtain entrance. The only other watcher for the republican party in this district was an inmate of the Harbor, and the testimony discloses the fact that he was intoxicated during the election.

THE FACTS AS TO THE EIGHTH ELECTION DISTRICT OF THE TOWN
OF CASTLETON.

The testimony shows that seven persons whose names appeared upon the poll lists were not registered; one name appears as voting twice, separate ballot numbers; one other person was transferred to the insane asylum in February, 1893; three others, resident in the institution, were absent on election day, and two others credited to the institution were unknown there. Eight inmates of the Harbor, whose names appear on the poll lists,

testified that they did not vote at the election. Besides these, some nineteen other persons appearing upon the poll lists as resident, outside of Sailors' Snug Harbor, and in the eighth election district, are unknown in that district.

The poll lists and registers of electors of this district disclose the remarkable fact that seventy-six of the persons appearing upon the poll lists as having voted were assisted to vote; not one of these persons took the oath prescribed by law; seventy of them were inmates of Sailors' Snug Harbor and the physician of that institution, Dr. Joy, testified that he knew them all, and of the seventy only three were disabled so as to require assistance in folding their ballots. (See testimony of Joy, Assembly Doc. No. 15, p. 90.) Thirty-nine of the persons assisted appear on the record to have been assisted by Edward Muller, a democrat, and the sheriff of the county of Richmond; a large number of others were assisted by one Henry Eichenberger, an official of the village of New Brighton; still others were assisted by Augustus A. Acker, the democratic candidate for justice of the sessions, at this election, and others by one Edwin Twifort, who appears to have been an assistant of the district attorney of the county. Mr. Muller seems to have played the same part in the eighth election district as Mr. Tully in the ninth, and, with the active aid and connivance of the election officials "ran" the election at this polling-place.

THE FACTS AS TO THE FIFTH ELECTION DISTRICT IN THE TOWN OF CASTLETON.

Prior to the election, and on the last day of registration, a demand was made upon the several inspectors of election of this district, at the place of registry, to permit an inspection of the register and of the certified copies thereof, which demand the inspectors refused. They failed to post a copy of the registry list in the polling-place, as required by law; they also refused to strike from the registry list the names of some forty persons not entitled to be registered. An application was made to Justice Cullen, one

of the justices of the Supreme Court, for the second judicial district, to strike those names from the registry. On the return of the order the inspectors appeared and by their affidavits, admitted that some of the names appearing upon the registry list had wrong addresses; that they were satisfied since the demand had been made upon them that nineteen others were not entitled to register, and they had stricken the names from the register. The justice, after directing that notice be given by mailing to all alleged persons whose names were upon the registry, and whom it was sought to strike from the register, and after adjourning the proceeding so that such notice could be given, and being satisfied that there were no such persons resident within said election district, ordered that nineteen other names, besides those already stricken from the register by the inspectors as aforesaid, should be stricken therefrom.

On election day, about one o'clock in the afternoon, the inspectors of this district directed a police officer to eject Michael Horgan, the regularly-appointed republican watcher, from the polling place, on the ground that he was a democrat. Application was at once made to the Special Term of the Supreme Court of Brooklyn, for a mandamus reinstating him and an order to show cause was issued by Mr. Justice Cullen, holding Special Term, directing the inspectors to show cause why said watcher should not be reinstated. An attempt was made to serve this order on the inspectors, at the polling place, at 5 o'clock in the afternoon, just after the polls had closed. The door of the polling place was closed, and two police officers inside of the polling place refused to permit entrance thereto, although a third police officer on the outside of the door endeavored to procure the entrance of the person attempting to serve such order. The inspectors were undoubtedly aware of the attempt being made to serve this order, and refused to permit the door of the polling place to be opened. It appears by the testimony of John Hayes (Assembly Document No. 15, page 157), who was the other republican watcher, that immediately after the polls were closed, the voted ballots were removed from the ballot-box and were then counted and compared with the poll lists;

that he was invited by the chairman of the board of inspectors to assist in the assorting and counting of the votes and that, while he was engaged in counting certain of the republican ballots which had been assorted out, all the other ballots disappeared and he was informed that they had been burned. This was within half an hour after the closing of the polling place, and within a few minutes after the attempt to serve the order to show cause above mentioned, and before any statement of the result had been made out or certified; and no opportunity was given to the watcher to examine these ballots. When it is recalled that the law expressly forbids any watcher to handle a ballot, and requires that the ballots be not destroyed until the three statements of the result of the canvass of the votes have been made and signed and proclamation of the result has been made by the inspectors, and that all the ballots shall be exhibited to the watcher for examination, if he so requires, it is clear that these ballots were destroyed in direct violation of the law and for a fraudulent purpose. It also appears that one of the policemen, a brother of the chairman of the board of inspectors, took part in the counting of the votes. Undoubtedly the inspectors kept the polling place closed contrary to law, and prevented the admission of the person endeavoring to serve the order to show cause, for a fraudulent purpose. They lulled the suspicion of the republican watcher by permitting him to count certain of the ballots, and while his attention was thus diverted, destroyed all the other ballots. It also appears that at least three of the persons whose names appear upon the poll lists of this district were not registered.

The testimony of Hayes was not contradicted; only two witnesses were called by the contestee, being McCarthy, the alleged republican inspector, and the democratic poll clerk. These witnesses corroborated Hayes as to the disappearance of the ballots. McCarthy testified that he had counted the ballots before they were destroyed, and that they tallied with the statement made by the inspectors; but his testimony was materially shaken on cross-

examination, and the committee are of the opinion that he was not a credible witness. He testified that the registry of electors kept by him was not in his handwriting, but was made out by one of the democratic inspectors. No effort was made on the part of the contestee to call the two democratic inspectors or any democratic watcher, or the other poll clerk, or the two ballot clerks, to refute the testimony on the part of the contestant. Besides these persons, the only persons in the booth were the two policemen above mentioned, but they were not called as witnesses. The democratic poll clerk above mentioned, testified that the ballots were counted by the inspectors, but that he did not see one of them.

THE FACTS AS TO THE FOURTH ELECTION DISTRICT OF THE TOWN SOUTHFIELD.

In this district the regular republican inspector, for some reason, did not appear at the opening of the polls, and the two democratic inspectors thereupon selected as the republican inspector, one Thomas Turner, who acted as such inspector on election day. At the close of the polls all of the inspectors joined in directing a police officer to eject one George Cornell, the regular appointed watcher of the republican party, from the polling place, on the ground that he was not a republican, but a democrat. The door of the polling place was then closed and locked, and a police officer stationed inside. Besides the election officers and policemen there was one republican and two democratic watchers within the polling place. On demand of the republican watcher and of the republican poll clerk that the ballots be counted in such a way that their contents should be disclosed, the democratic chairman refused and the republican watcher was not permitted to see all of the ballots. The democratic inspectors and Turner, the alleged republican inspector, and the watcher for the democratic party, testified that they saw all of the ballots and that the count, as certified by the inspectors was correct; but great suspicion attaches to the whole proceeding on the part of the inspectors, especially in view of the

fact that they had ejected the other republican watcher and refused to allow the one who remained to see all the ballots.

AS TO THE LAW.

The counsel for the contestee substantially concedes that a return made in due form, and signed by the proper officers, may be disregarded where there is proof that the proceedings in the conduct of the election or in the return of the vote were so tainted with fraud that the truth cannot be deduced therefrom. That this is the well-settled law, there can be no doubt. (See McCrary on Elections, chapter 16.)

It is the well-settled law of this State.

(See *People ex rel. Judson v. Thatcher*, 55 N. Y. 525; *People ex rel. Stapleton v. Dell*, 119 N. Y. 175, and particularly page 188.)

But while it is true that the vote of the district to which such discredited return relates is not to be disregarded in every instance, and the question as to who received the majority of the legal votes is to be ascertained by other legal proof, yet if it clearly appears that if the election was conducted under such circumstances of fraud, intimidation, violence or undue influence, participated in by the election officers and by the agents of one political party, so that the honest result is impossible or impracticable of ascertainment, the vote of such a district should be absolutely disregarded, even though it appears that some honest voter is thus made to suffer for the good of the whole body politic. In such a case it is impossible to ascertain what the true will of the voters of the district would have been had it been honestly and fairly expressed; and while the general rule is that a voter is not to be disfranchised for illegal acts on the part of election officials or on the part of others, yet it is apparent that under such circumstances as existed in the fifth, eighth and ninth election districts of the town of Castleton at the last election, the ascertainment of the will of the voters of these districts by legal evidence is an utter impossibility.

All ballots cast by illegally assisted voters were unlawful votes and should be rejected. This is a proposition which your committee feels justified by high authority in resolutely maintaining.

(See *People ex rel. Nichols v. Board of Canvassers*, 129 N. Y. 395, and see particularly the prevailing opinions, *Ruger, C. J. and O'Brien and Gray, JJ.*)

Such ballots were cast in direct violation of the spirit and object of the secret ballot law, the avowed purpose of which is to enable the voter to cast his ballot without possibility of revealing by the act of voting the identity or political complexion of the candidate voted for, and thus to prevent bribery and intimidation. They were prepared and voted in utter disregard of the provisions of section 104 of the Election Law, and in defiance of its express language. The voter, in disclosing the contents of his ballot, and the inspectors in permitting him to do so and receiving his ballot, violated the provisions of the Penal Code, and were guilty of felony or misdemeanor. (Sections 41 I, and 41 J, and subdivisions 10, 11 and 15 of section 41 K of the Penal Code.) It is no answer to these propositions to say that the voter or inspectors were innocent of intentional wrongdoing (see the case last above cited), or that the voter is thereby disfranchised. The law does not stop to make the impossible inquiry as to the motives of the voter. He deliberately violates the law, which he is presumed to know, and becomes an illegal voter and his ballot an unlawful vote. Nor is it any answer to say that because the voter and the inspectors may be punished for their illegal acts, no other penalty can attach and the vote must be counted. It would certainly be an absurd and unreasonable contention that a candidate should receive the benefit of such an unlawful vote because the illegal voter is liable to penal consequence for his act. Such a contention is contrary to precedent, and we venture to say that no authority for such a claim can be found. The very essence of the contest in *quo warranto* and contested election cases is, Which candidate received the greatest

number of *legal* votes? (See *People v. Cook*, 8 N. Y. 67; *People v. Pease*, 27 N. Y. 45.)

If such a claim is well founded, then contested elections would become a farce and candidates might receive and enjoy an office, and the fees and emoluments thereof, to which they were elected by colonizers and repeaters or by bribed and fraudulent voters. The argument carries its own reputation. It is true that the Election Law does not in express language say that upon the canvass of the votes such ballots shall be rejected, but this is because the policy of the law does not give to merely ministerial officers like inspectors of election and boards of canvassers, the power to adjudicate on questions of this kind, but leaves their determination to the proper tribunals. (See *People v. Bell*, 119 N. Y. 175, and see particularly page 188.)

Counsel for the contestee, conceding the rule to be as above stated in regard to the rejection of the return, attempted to rehabilitate his majority in the ninth election district of Castleton by calling voters to testify that they had voted the democratic ticket. He called seventy-five voters, more than one-half of whom testified that they were assisted in the manner above mentioned: still others were solicited to permit assistance and refused; still others, who testified that they prepared their ballots without assistance, were unable to testify clearly as to the ticket that they voted, and one testified that he voted the republican ticket. The contestant also called twenty witnesses to testify that they had voted the straight republican ballot; three of these testified that they were assisted in the manner above mentioned; others testified that they were solicited by Mr. Tully and his aids to permit assistance and refused it; some were actually followed into the voting booths by these gentry, and in two instances they were actually obliged to exclude these persons from the booth. No attempt was made by either of the parties to poll the votes in any of the other districts. If we concede that there was no fraud outside of the fifth, eighth and ninth districts of Castleton, and exclude those districts, Michael Conklin, the contestant, would

have a majority over Michael McGuire, the contestee, of 177 votes. The returns from the fifth, eighth and ninth election districts, being rejected for fraud, under the well-settled views of law such returns are no longer evidence of the votes of those districts, and the parties to this contest, in any event, can only be allowed such votes in those districts as the evidence shows were legally cast for him. Conceding to the contestee seventy-four votes which were polled in the ninth district of Castleton as above mentioned, and seven votes in the fifth district of the town of Southfield, which were not returned by the inspectors; in crediting Michael Conklin, the contestant, with twenty votes polled by him in the ninth district of Castleton, as above mentioned, and one vote in the fifth district of Southfield, and one vote in the ninth district of Middletown, conceded to have been cast for him and not counted and one vote sworn to by witness of contestee. contestant, Michael Conklin, would still have a plurality of 119 votes, upon the evidence in the case, disregarding the allegations of fraud in the fourth election district of Southfield.

In thus limiting our decision to the fifth, eighth and ninth districts of the town of Castleton, we do not mean to hold that there was not enough fraud shown in the fourth election district of Southfield to justify the rejection of the return from that district also, and thereby materially to increase the majority of Mr. Conklin. On the contrary, the conduct of all the inspectors of that district in the ejection of a lawful watcher, and in the canvass of the vote behind closed and locked doors, and without giving the watchers an opportunity to verify the count — all gross violations of the Election Law and of their oath of office — are quite sufficient to justify the inference of fraud and conspiracy in the conduct of the election, and the canvass of the votes, and wholly to discredit their return. What faith can be reposed in any act of inspectors who have so shamefully and willfully violated the law, and why should their declaration of the result of the canvass be regarded as unimpeached, or why should the people accept their canvass without question?

We, therefore, report that the contestant, Michael Conklin, was duly elected to the office of member of Assembly for the county of Richmond, at the last general election, by a majority of 119 votes over and above the lawful votes received by the contestee, Michael McGuire, and by a plurality over all votes cast for all the candidates for member of Assembly from said county, and that the said Michael Conklin was duly elected member of Assembly from the county of Richmond, at said election; and we do hereby recommend the adoption of the following resolution:

Resolved, That Michael Conklin was at the last general election, elected to the office of member of Assembly for Richmond county, which seat is now held by Michael McGuire, and the said Michael Conklin be, and he is hereby awarded the same.

All of which is respectfully submitted,

GEO. S. HORTON,
J. F. TERRY,
EUGENE F. VACHERON,
PHILLIP KECK,
WESLEY GOULD,
JAMES R. SHEFFIELD.

Dated *March 26*, 1894.

MINORITY REPORT.

The testimony produced in support of the contest made against the election of Michael McGuire, as Assemblyman from Richmond county, covers the transactions in a number of election districts in different towns.

The counsel for the contestant has, however, withdrawn all charges except those affecting four election districts, namely, the fourth of Southfield and the fifth, eighth and ninth of Castleton.

At the last election a portion of the democratic party known as "the reformers" or "anti-snappers" nominated a ticket which was composed of the democratic State candidates (except May-

nard), and the republican county candidates. It was decided by the Supreme Court that this was not a party nomination and that they were not entitled to have an official ballot printed. Therefore, they worked in connection with the republican party and nominated a watcher in each district, who received a certificate from the republican party. In the fourth of Southfield and the fifth and ninth of Castleton (but not in the eighth), the watcher who had been nominated by this section of the democratic party was excluded from the polls upon the ground that he was not a republican, but a democrat, and, therefore, his appointment was improper. In the fourth of Southfield this was done with the assent of the republican inspector, and another republican was asked to and did take his place.

It is difficult to ascertain how this singular idea of the law originated. It is manifest that there was a very bitter feeling between the regular democrats and those of their party who were acting in opposition to them, which led the former to do all they could to annoy the representatives of the latter. That the fact that the Supreme Court had decided them not to be a party did not deprive their members of the right to accept a nomination as watchers from the republican party is too clear to need argument. It is also clear that, however, improper the exclusion might have been, the action of the board of inspectors in so excluding them, did not itself vitiate the election and deprive the voters in the district of the right to have their votes counted as cast.

It is well settled law in this State that the inspectors of election are mere ministerial officers and that no act or default on their part can effect the result of the election unless it is shown to have rendered it impossible to ascertain the truth in regard to the votes cast.

In the case of the People ex rel. v. Wilson, 62 N. Y. 186, it was held that it was improper to declare the votes cast in the second ward of the city of Rochester illegal, because it was shown that the inspectors had made up the registry by using the registry

of the spring election instead of that of the general election in the fall; or that only two inspectors were present at the meeting of the preliminary registry; or that they did not appoint a chairman, or take the oath of office at that meeting; or that they did not certify either the preliminary or completed register (page 189). The courts specially held (page 193) that the duties in these particulars imposed upon the inspectors must be regarded as directory merely, and not jurisdictional; "and the omission of the inspectors to observe them did not, according to the current of authority, invalidate their proceedings." It also quoted and affirmed the decision in the case of *People v. Cook*, 8 N. Y. 67, that an election was not invalidated, because the inspectors and clerks had omitted to take the oath of office besides failing to appoint two clerks, as required by the statute, or because of their closing the outer door at sundown and preventing any person from entering the room where the poll of the election was held and receiving thereafter the votes of those in the room. "That these irregularities were regarded as not being matters of substance which should invalidate the election."

The court further said "the construction claimed by the relator, if admitted, would punish the electors for the delinquencies of the inspectors, and render the right of suffrage insecure, and liable to be defeated by their fraud, caprice or negligence." (Page 196.)

It further held that as the forty-three votes cast by persons not registered, although plainly illegal, that if they were taken from the vote of the defendant, the result would not be changed, and for this reason the fact that they were illegally received is immaterial. Citing *People v. Thatcher*, 55 N. Y. 525.

The exclusion of the watchers is not shown to have in any way effected the result in the fourth of Southfield or the fifth and eighth of Castleton. The regular republican watcher remained and was active and vigilant.

It appears that after the exclusion of the watcher from the fifth of Castleton, a mandamus was issued by the Supreme Court,

requiring his admission and that the person endeavoring to serve it was unable to obtain admission.

This matter also is one which does not affect the validity of the election. Hayes, the republican inspector in this district, was active and vigilant. In fact, he is one of the witnesses through whom the contestant seeks to impugn the count. His idea was that the paper which was sought to be served was "a note from a judge of the Supreme Court." (Printed testimony, page 157.) But it had nothing to do with the count.

We are, therefore, of the opinion that the question in regard to the election in these districts should be decided upon the sole ground of whether or not any fraud has been shown in the actual counting of the votes, or as to whether any fraudulent votes have been cast and as to the effect of such fraud or fraudulent votes upon the result.

An attack is made upon the count in the fourth district of Southfield, based upon the testimony of Roerick, the poll clerk, and Timmilin, the republican watcher.

It is admitted by all the witnesses that at the close of the polls the inspectors took one of the folding booths and made a table of it on which to count the ballots, the sides serving as legs. That they counted the ballots unopened and then separated them into two piles, one of straight democratic and the other of straight republican, there being two scratches in addition. That the democratic ballots had been counted and announced as 138, when the table collapsed, and part of the republican tickets fell to the floor, the democratic tickets being caught by one of the inspectors.

It is conceded by Roerick that the falling was accidental and that there was nothing wrong in the subsequent gathering up of the fallen ballots, and there can be no doubt but that this was the case. His main contention is that one of the inspectors in counting the ballots did not expose their whole face, and that the objections of the republican watcher, Timmilin, to this action were disregarded. But Timmilin, when called to corroborate him on

this point, does not do so. Timmilin's objection is that his request for a recount was refused. He says he stood between the two democratic inspectors, but watched one of them only; that he saw sixty-six of the democratic votes counted, but as there was some wrangling about some scratched tickets being among the straight, he did not see the count of the remainder. He, therefore, asked to see the whole number of one hundred and thirty-eight counted a second time on the table "only for accuracy's sake" (page 164), and the inspectors declared that it was not necessary.

On the other hand, it appears by the testimony of the three inspectors and Joseph J. Curren that the inspectors first counted the ballots unopened, that they were then separated into piles of straight tickets, there being one hundred and thirty-eight democratic, twenty-eight republican, and two scratched. That they then counted the pile of democratic ballots, passing them from one to the other until all had counted them, and then counted the republican in the same way, the ballots being completely exposed. That the democratic ballots had been counted and the result tallied before the table collapsed and did not fall upon the floor, all that fell being twenty-one republican tickets which were picked up and counted and made the tally correct.

It is clear upon the evidence that the count in this district was correct, and that objections which were made in regard to it are without foundation. In fact, as the count of the unopened ballots agreed with the votes cast and the ballots were sorted, and the democratic ballots counted and tallied before the table collapsed, the number of republican ballots was a mere matter of subtraction.

Mr. Timmilin's claim was for a recount "only for accuracy's sake," and the refusal of the inspectors to make such a count cannot be considered to be fraudulent in the face of the testimony of four unimpeached witnesses that it was fair.

In the fifth of Castleton the contest is based upon the statement of Hayes, the republican watcher (printed testimony, page

158) that the inspectors first counted the ballots unopened; then they started to open them and count them; "that *he* took all the democratic tickets straight and put them in one pile and did the same with the republican tickets, and that he was given the privilege of counting them." He then goes on to say that he counted the republican ballots twice, and that in the meantime the other inspectors were counting too (page 160). That when he got through he asked the republican inspector where the democratic tickets were, and he said he did not know; that first he said he did not count them, and then he said he did. That there were no democratic tickets on the table when he (Hayes) got through.

As he admits that the total number of ballots agreed with the votes cast, and that the ballots were properly sorted, the republican vote being accurately counted, the finding of the democratic vote was a mere matter of subtraction.

Certainly this statement is no evidence that they were not properly counted.

It is, however, shown by the testimony of James McCarthy, the republican inspector, and Charles D. McGuire, the poll clerk, that all the ballots were counted in the regular way. The contestant has produced a package of unvoted ballots (which were filed, instead of being destroyed) to show that there were more republican votes cast than credit was given for, there being 106 Myer ballots returned, 117 Palmer, 181 Bogardus, 182 De Leon and 192 Wright.

From the fact that the paper ballots were extensively used, the number of ballots returned as unvoted affords no criterion of the actual vote, and for this reason the law requires the unvoted ballots to be destroyed.

There were 260 ballots issued to each voter. Deducting the number of ballots returned would give the number of votes cast. There being five ballots of 260 each, makes a total of 1,300. It appears, however, that deducting the

106	Myer ballots returned would give a vote of	154
117	Palmer ballots returned would give a vote of	143
181	Bogardus ballots returned would give a vote of	79
182	De Leon ballots returned would give a vote of	78
192	Wright ballots returned would give a vote of	68

778

This would call for a vote of 522
 Adding the number of ballots cast 260
 to the ballots returned makes only 1,038, whereas there were 1,300
 ballots issued. It is, therefore, clear that this package only in-
 cludes a part of the unvoted ballots, and being evidently a blunder,
 may include some of those that were voted.

The vote in the eighth district of Castleton presents a novel
 question for decision.

All the election officers in this district and almost all the voters
 were inmates of Sailors' Snug Harbor. These are all old, broken-
 down sailors, ranging from about sixty to eighty-four years of age.
 One of the inspectors called before the committee was seventy-six,
 the others sixty-seven. Most of the voters are more or less infirm, of
 poor sight, many partially paralyzed or injured, although not dis-
 abled to the extent that the law required them to be assisted. All
 being inmates of the same institution, many for long periods, they
 were known to each other, and their infirmities were also known.
 Inspector Stagg said (page 893) that they were so well known
 that no oath was necessary. •

All these voters were residents of the district and were legal
 voters therein. When these men presented themselves to vote
 many of them were asked by the inspectors if they needed assist-
 ance to fold their ballots. If they did a person was allowed to
 accompany them into the booth for that purpose. But while the
 persons who assisted these voters were sworn, and, in some cases, the
 voter himself, in no case (excepting one case where a man was
 blind) was the statutory oath administered that the voter was

blind, unable to see both his hands or go into the booth without help. Whatever oath was administered was merely that he could not see well, and could not or did not know how to fold his ballot.

No fraud whatever upon the part of any of the voters, except this assistance, is shown; neither has any fraud been established on behalf of any of the inspectors who entered upon their books the name of each person assisted.

It is shown by the evidence of the physician of the Harbor that there were sixty-six inmates of the Sailors' Snug Harbor who voted in that district, and appear on the returns as having been assisted as above stated, who were not blind or unable to use both hands or walk to the booth without aid.

It is claimed by the contestant that under the provisions of the Election Law not more than one person shall occupy the voting booth at the same time, except that a voter who shall declare under oath to the inspectors of election that, by reason of total blindness, etc., he is unable to receive or prepare his ballots without assistance, may select a person for that purpose, who shall be allowed to pass within the guardrail and receive such ballots, and to enter the voting booth with such voter and there assist him in preparing his ballot and that "no voter shall otherwise ask or receive the assistance of any person within the polling place in the preparation of his ballot or divulge to any one within the polling place the name of any candidate for whom he intends to vote or for whom he has voted." The receiving of assistance by the voters in question, as above stated, constitutes fraud and makes the vote of each of them a fraudulent vote, which cannot be counted in determining the person who was elected in the district; that it is analagous to a bribe vote.

We are of the opinion that this analogy does not exist, as the voters themselves were innocent of any attempt to violate the law.

While there is no evidence offered in regard to the eighth district of Castleton, in the ninth district it is shown that after some of the voters of the same class had gone into the booth a person

was allowed to enter it after them and to offer them assistance, and that this was accepted in many cases with the idea that he was an election official.

It certainly was not the duty of the voter to eject him, nor can he be considered as forfeiting his vote because he did not do so.

It was not in the power of the voter to dictate to the inspector what oath he should take, nor to administer it to himself. In order to deprive a citizen of his franchise for violating any provision of the Election Law, it is indispensable that some clear, unquestioned provision of law should exist, affecting that result. (*People v. Board*, 129 N. Y. 395, cited below.) Such an important right of a citizen cannot be taken from him by any negligent, careless or even fraudulent act of an election officer.

The committee expresses no opinion as to what course should be adopted if these voters had willfully taken a false oath in regard to their physical condition. That would bring in a question of personal fraud which would make a very different state of facts.

But as above stated, no such fraud on behalf of the voter has been shown in these cases, and the transaction was due to the carelessness and inefficiency of the inspectors.

We consider that the duty of the inspectors in this respect is ministerial, and while they may be punished for violating it, yet that their failure to perform it cannot affect the validity of the election or disfranchise a legal voter who casts his ballot at it any more than their action in receiving the vote of a legal voter after the time fixed for the closing of the polls, which in the case above cited, was held not to affect the election.

We are, therefore, of the opinion that the votes of these thirty-six assisted voters in this district were properly counted for Mr. McGuire.

It will be remembered that the only provision in regard to the rejection of ballots contained in the Election Law is as to marked ballots, and as to this there is a special provision of law that the

inspector shall not receive them, and providing that these votes, if they are received, must not be counted.

In *People ex rel. Nichols v. Board of Canvassers of Onondaga County* (129 N. Y., page 395), it was held, in referring to the marked ballots, that *in the absence of some clear and positive prohibition in the statute against counting such ballots* the tendency of the courts would undoubtedly be in the direction of effectuating, as far as possible, the intent of the voter; and that the statute should be so construed as not to place the restriction in this way, but as to marked ballots, where there is such a provision, the ballots so cast are void, and should not be counted (p. 402). This decision was made by the court, upon the ground that besides the prohibition that no voter or election officer should reveal to another person the name of another candidate for whom he had voted, and that he should not mark his ballot, the law provided that any ballot which contained a mark, with the intent that such ballot should afterwards be identified, *should be void and of no effect* (p. 404). *That no such ballot should be deposited in the ballot box, and that no ballot which has not the printed official indorsement should be counted in the canvass* (p. 408). See Judge Ruger's opinion, page 421.

The fact of this provision excluding marked ballots, and that there is no other provision of the Election Law excluding a ballot, demonstrates that the ballots in question should not be disregarded.

The action of the election officers in the ninth district of Castleton is shown to be such that no reliance has been placed upon it by the sitting member. He has attempted to establish his vote by oral testimony by calling the voters. A number of these have shown that they were assisted. No fraud whatever on their behalf has been shown. No oath was ever administered to any of them, and the person assisting them in many cases thrust his assistance upon them and it was accepted in good faith. They are, therefore, legal votes.

It is claimed by the counsel for the contestant that in the eighth district of Castleton there were forty-five illegal votes. Eight of

these were persons not registered and the remainder were personated or voters whose residence cannot be found. In four of these cases of registry it is evident that the name of one voter who was registered has been confounded with another who voted. The other four votes are not explained. There are also included in the different classes of persons not found such repetitions as to bring the whole number of votes in question down to thirty-five.

Under the settled law of this State all that the contestant is entitled to claim is that these thirty-five votes shall be deducted from those given his adversary and that if, after such deduction, the result is not affected, their rejection is immaterial.

The majority for Mr. McGuire was two hundred and eighty-four. To this should be added seven ballots cast for him in the ninth of New Brighton, which were not counted by the inspectors and which did not cover the entire ballot. This makes the vote two hundred and ninety-one. From this should be deducted one vote cast for M. Conklin, which was not counted for the contestant, which makes McGuire's majority two hundred and ninety. Deducting from this the entire vote given in the ninth of Castleton, two hundred and fifty-two, leaves thirty-nine, to which is to be added twenty votes, the number cast for Conklin in this district, which are also to be rejected, making a total of fifty-nine. Deducting thirty-five from this leaves McGuire's majority twenty-four.

In addition to this, he has proved by oral testimony that there were cast for him in the ninth of Castleton seventy-three votes. Mr. Conklin has proved twenty votes (six of which were assisted). This gives McGuire a clear majority of seventy-five votes.

We are, therefore, of the opinion that Michael McGuire has been legally elected as member of Assembly from Richmond county and is entitled to his seat.

We, therefore, report the following resolution:

Resolved, That the petition of Michael Conklin, claiming to be elected Assemblyman from Richmond county, State of New York, be, and the same is hereby dismissed.

Resolved, That Michael McGuire, the sitting member of Assembly for Richmond county, is entitled to his seat in the Assembly of the State of New as member of Assembly for said county.

All of which is respectfully submitted,

HENRY J. McNAMEE,
VICTOR J. DOWLING.

Dated *March 26*, 1894.

Mr. Ainsworth moved that the time for debate upon said report be limited, and that a vote be taken upon the question at 4 o'clock.

Mr. Thornton in the chair.

Extended debate being had.

Mr. Speaker in the chair.

Mr. Sulzer offered the following as a substitute for the resolution reported by a majority of the committee.

Resolved, That the petition of Michael Conklin claiming to be elected Assemblyman from Richmond county, State of New York, be, and the same is hereby, dismissed.

Resolved, That Michael McGuire, the sitting member of Assembly for Richmond county, is entitled to his seat in the Assembly of the State of New York as member of Assembly for said county.

Mr. Ainsworth moved a call of the members of the House.

Mr. Speaker put the question whether the house would agree to said motion, and it was determined in the affirmative.

Mr. Speaker put the question whether the House would agree to the resolution of Mr. Sulzer, and it was determined in the negative.

When the name of Mr. McGuire was called, he asked to be and was excused from voting.

Mr. Speaker put the question whether the House would agree to the adoption of the resolution reported by a majority of the committee, and it was determined in the affirmative.

Ayes, 71. Noes, 53.

Mr. Speaker declared Michael Conklin entitled to the seat now occupied by Michael McGuire.

Mr. Conklin appeared before the bar of the House, and the oath of office was administered to him by the Speaker.

Assembly Journal, 117th Session, 1894.

Case of Edward R. Duffy and Patrick J. Kerrigan.

IN ASSEMBLY, TUESDAY, *January 2, 1894.*

Mr. Sheffield presented the petition of Edward R. Duffy, contesting the seat occupied by Patrick J. Kerrigan, as member of Assembly for the nineteenth district of New York county; which was referred to the committee on privileges and elections.

WEDNESDAY, *February 14, 1894.*

Mr. Horton, from the committee on privileges and elections, presented a portion of the testimony taken in the matter of the contest of Edward H. Duffy for the seat now held by Hon. Patrick J. Kerrigan for the nineteenth Assembly district of New York county; which was laid upon the table and ordered printed.

THURSDAY, *February 15, 1894.*

Mr. J. F. Terry, from the committee on privileges and elections submitted the following report:

To the Honorable, the Assembly of the State of New York:

Your committee on privileges and elections, to which was referred the petition of Edward R. Duffy, praying for the seat now held by the Hon. Patrick J. Kerrigan, as member of Assembly from the nineteenth Assembly district in the city and county of New York, do respectfully report that we have been attended by the Hon. Patrick J. Kerrigan and his counsel, Gilbert D. Lamb, Esq., and the counsel for the said contestant, Charles B.

Page, Esq., and that a hearing was had in respect to the matter, after two adjournments, and briefs were afterwards submitted by the said counsel for the respective parties.

That the facts in the matter were conceded in behalf of the respective parties as follows:

STIPULATED.

1. That Patrick J. Kerrigan received a majority of the votes cast for the office of Assemblyman for the nineteenth Assembly district at the general election held on November 7, 1893, and received from the clerk of the city and county of New York the usual certificate of election for said office for the year 1894.

2. That on November 7, 1893, and for one year previous thereto, Patrick J. Kerrigan was a section foreman appointed thereto by the commissioner of street cleaning, pursuant to chapter 269 of the Laws of 1892, and detailed to receipt for articles delivered at the so-called encumbrance yard.

3. That said Kerrigan received no certificate of appointment to said position.

4. That said Kerrigan took no oath of office at any time, either before or at the time of said appointment, or at any time thereafter, and was not required to take any oath.

5. That said Kerrigan gave no bond as a condition of his accepting said position.

6. That said Kerrigan was not appointed to said position for any definite period and the said commissioner of street cleaning had the right to define and prescribe his duties.

STIPULATED.

1. That the contestant, Edward R. Duffy, within one hundred days preceding November 7, 1893, was an inspector of election in his district, appointed thereto by the police department of the city of New York, pursuant to law.

2. That said Duffy subscribed and swore to the oath of office to enable him to act as an inspector on September 27, 1893.

3. That within said one hundred days said Duffy did enter upon the duties of the position of such inspector on the first day of registration prescribed by law.

4. That said Duffy resigned his said position of inspector on October 17, 1893, and stipulated:

That on September 7, 1893, the electors of the nineteenth Assembly district were unaware of any facts rendering said Kerrigan or Duffy ineligible for the office of member of Assembly for the nineteenth Assembly district.

Upon the concession mentioned the only question in the matter was one of law, viz.:

Was the position of section foreman in the street cleaning department of the city of New York, an "office" under the city government of New York, within the meaning of the constitutional inhibition, being section 8 of article 3 thereof, as follows:

"No person shall be eligible to the Legislature who, at the time of his election is, or within one hundred days previous thereto has been, a member of Congress, a civil or military officer under the United States or under any city government."

There are numerous decisions of the courts of this State which make a clear distinction between an officer and an employee or servant under the government, notably, the case of Mr. Frederick Law Olmstead, reported in the forty-second Superior Court Reports, page 481, etc. Mr. Olmstead was the landscape architect of the Central Park, appointed by the park commissioners of the city of New York, at an annual salary of \$6,000, and while holding this position was appointed one of the commissioners of the State survey; it was thereupon claimed by the comptroller of the city of New York that Mr. Olmstead by accepting the latter, which was a State office, had vacated his office under the city government, under a statute forbidding the holding of two offices by the same person, and his salary was refused him by the city. But the court decided that a landscape architect was a mere employee as contradistinguished from an officer in that the latter

clearly "embraces the idea of tenure, duration, fees or emoluments and powers, as well as that of duty."

By analogy it seems clear that the position of section foreman comes under the definition of employee, and is not an officer within the definition laid down in the last cited case, for it seems to be conceded by the agreed statements of facts that Mr. Kerri-gan received no certificate of appointment as section foreman, had no fixed term of office, and discharged no duties and exercised no powers directly pending upon the authority of law, and, moreover, took no oath of office.

In the case of *Collins v. Mayor*, etc. (3 Hun's Rep., p. 680), approved in *Satterlee v. Board of Police* (75 N. Y. Rep., p 38), it was held that the true test to distinguish officers from employees, is in the obligation to take the oath prescribed by law.

And section 54 of Consolidation Act points to the same conclusion. "Section 54. Every person elected or appointed to any office under the city government shall, within five days after notice of such election and appointment, take and subscribe before the mayor or any judge of a court of record, an oath or affirmation faithfully to perform the duties of his office; which oath or affirmation shall be filed in the office of the mayor."

The constitutional inhibition, in question, went into effect on January 1, 1875, and several cases have received the consideration of previous Legislatures, and the principles of law above set forth have invariably been followed and adopted.

A brief reference to these legislative precedents is hereby submitted. The first case was that of Senator James W. Gerard, who, at the time of his election as a Senator from New York city, was a school commissioner appointed by the mayor of that city. He was held to be ineligible. (See Senate Journal of 1876, p. 209.)

The next case was that of A. W. Draper, of Albany who, at the time of his election as member of Assembly in 1881, was a school trustee of the city of Albany, to which he had been elected by the people. He, also, was held to be eligible within the doc-

trine of the cases above cited. (See Assembly Journal, 1881, vol. 1, pp. 716-731.)

The next case was that of Mr. Tumilty, which was decided last year, Mr. Tumilty, within the time of the constitutional inhibition, was a supervisor of one of the wards of the city of Rochester, and notwithstanding that the charter of the latter city provides that the officers of that city shall be "the mayor, one supervisor for each ward," etc., he was held eligible as a member of Assembly. (See Assembly Document No. 87, vol. 6 of 1885.)

The next case was that of Hon. John B. Shea, whose seat in the Assembly was contested on the ground that his position as dock-master in the city of New York, was an office under the city government. It was determined that he was not such an officer. (See Assembly Document, 1886, vol. 6, No. 73.)

CONCLUSION.

The undersigned are, therefore, of the opinion that the Hon. Patrick J. Kerrigan was eligible to election as member of Assembly for the nineteenth Assembly district in the city and county of New York, and that the application upon the petition of Edward R. Duffy, contesting said seat should be denied. And your committee, for the reasons aforesaid, report the following resolution and recommend its adoption by your honorable body:

Resolved, That the Honorable Patrick J. Kerrigan, the sitting member of Assembly for the nineteenth Assembly district of the city and county of New York, in the Assembly of this State for the year, 1894, is entitled to his seat therein as such member of Assembly. All of which is respectfully submitted.

GEO. S. HORTON.

EUGENE F. VACHERON,

J. F. TERRY.

HENRY McNAMEE.

VICTOR J. DOWLING.

JNO. C. HARRIGAN.

Committee.

Dated *February* 15, 1894.

Mr. Speaker put the question whether the House would agree to said report, and it was determined in the affirmative, a majority of all the members elected to the Assembly voting in favor thereof.

Ayes, 120. Noes, 00.

Assembly Journal, 117th session, 1894.

Case of William Dwyer and William J. Plant.

IN ASSEMBLY, TUESDAY, *January 2*, 1894.

Mr. Clark presented the petition of Wm. Dwyer, contesting the seat occupied by Wm. J. Plant, as member of Assembly for the first district of Kings county; which was referred to the committee on privileges and elections.

MONDAY, *March 26*, 1894.

Mr. J. F. Terry, from the committee on privileges and elections, presented a portion of the evidence in the contested election case of William Dwyer, contestant, against William J. Plant, contestee; which was laid upon the table and ordered printed.

FRIDAY, *April 6*, 1894.

Mr. Horton, from the committee on privileges and elections, presented the following report:

To the Honorable, the Assembly of the State of New York:

Your committee on privileges and elections presents the following report in the matter of the contest for a seat in this Assembly from the first district of Kings county, between William Dwyer, contestant, and William J. Plant, contestee.

Your committee, after organization, appointed Messrs. J. F. Terry chairman, and Eugene F. Vacheron and Henry McNamee a sub-committee to make the investigation herein. They attended the several hearings in the city of Brooklyn, both parties appearing by counsel, and all evidence received was duly recorded, and has been printed and made to form part of this report; William Dwyer, contestant, appearing with counsel George F. Elliott, Esq.,

and William J. Plant, the contestee, with counsel, Messrs. James B. Judge and Walter L. Durack.

The first district of Kings county includes the first, second and fourth wards of the city of Brooklyn, each ward being divided into a number of election districts, as appears in contestant's petition and the testimony. In certain election districts hereinafter named the conduct of the election last November was marked by the most outrageous frauds upon the franchise possible; it appears by the testimony that voters were colonized, falsely registered, bribed and induced to perjure themselves before the election officers with the very life of our nation (the ballot) in their hands; it was shown that in certain districts the party workers, members of the political party to which the contestee owes his nomination and election, attempted and oftentimes succeeded in dictating to the election officers themselves, inducing them to disregard the plain requirements of the election law and permit the election to assume the character of and appear a farce wholly outside of the guidance or sanction of the election laws.

Your committee was astonished by evidence produced relating to the lodging-house vote in this district; it was shown that just prior to election the various lodging houses filled up with persons who registered and afterwards voted for a consideration paid in many instances by the proprietor of the houses, an Italian, who was not produced by either party, though the contestant made diligent endeavor to find him.

Your committee view with alarm the long prevalent and increasing depravity of persons who constitute the lodging-house vote in cities, as shown by testimony herein. These poor wretches, enticed by yearly profit, exist for a brief time in these lodging houses, leaving after election, never intending to remain and acquiring no legal residence therein under the law, and yet voting for a price, wholly without law or right.

In the twelfth district of the first ward, more than one hundred persons voted as residents of Nos. 15 and 19 Atlantic avenue, lodging-houses of the lower sort, for men only, as the testimony shows;

a large number of these persons were "assisted" in preparing ballots, disability being wholly assumed as the election officers testify, and though more than forty persons in that district received "assistance," not one was produced who was actually "blind" or otherwise disabled. Testimony showing bribery of voters from Nos. 15 and 19 Atlantic avenue was presented, several persons stating under oath that they were paid money to vote the democratic ticket. The conduct of the election in the third district of the second ward, as the evidence shows, was unlawful, being remarkable because of the disgraceful interference by outsiders with regularly appointed republican election officers. There were a large number of votes cast in said district by non-residents and many persons were "assisted" who were in no sense entitled to receive "assistance;" and money was openly passed to voters immediately prior to and after the voters cast their ballots.

In the fourth district of the second ward the inspectors of election, the chairman of the board being a democrat, refused to recognize challenges made by a watcher at the polls of voters who received "assistance," the chairman not having administered the disability oath; and also challenges of persons known to be non-residents by the challenger, were passed without notice, rendering the election, as a witness testified, a farce and entirely irregular in form and substance; votes of many non-residents were received, also those of persons who were "assisted" though not disabled, the workers for the democratic candidates volunteering claims of disability in behalf of voters; and at least fifty persons received assistance who were not disabled in any way.

In certain districts the contestant has shown to your committee that persons were illegally registered, fraudulently voted and corruptly compensated for such votes, the number of persons who were paid for voting the democratic ticket being at least sixty; that the persons illegally registered and voted numbered at least one hundred and thirty, and those who voted fraudulently by reason of receiving assistance number two hundred and twenty-five.

It is the sense of your committee that in the first Assembly dis-

trict of Kings county, the last election was so corrupt as to endanger the peculiar institution of a free and secret ballot. The fact that a number of persons testified openly and shamelessly of their own criminality in receiving a bribe, together with the unlawful but general practice of workers and even the election officers at the recent election, convinces your committee that there exists in the mind of the public to-day no proper respect for the election laws or conception as to the absolute necessity for a proper observance of their requirements; it appears wise to your committee to condemn in the strongest and most emphatic terms the present practice on the part of any and all political parties or permitting or instructing the respective workers to "assist" persons not legally entitled to receive such assistance; the Legislature has enacted laws relating to elections and their conduct; the primary object of which was to prevent bribery of voters by enforcing a secret ballot, but there was manifested on the part of democratic officers and workers in the Assembly district, an intention to nullify those provisions, amounting to an organized conspiracy against the laws of this State.

The majority for Mr. Plant, as certified to by the board of county canvassers, upon which this certificate of election was awarded, was three hundred and ninety.

The contestant has shown to our satisfaction that three hundred and thirty-eight votes counted for Mr. Plant were cast by persons not entitled to vote, thus reducing his majority to fifty-two; but we believe that if the true inwardness of the frauds practiced at the election in the interest of the sitting member could be shown, it would appear that Mr. Plant did not receive *any* majority of the *legal* votes cast at that election. But in the absence of more positive proof, we cannot reject the majority of fifty-two thus shown for Mr. Plant.

We, therefore, report the following resolution, and recommend its adoption to your honorable body:

Resolved, That William J. Plant was elected member of Assembly for the first Assembly district of Kings county, at the election

held therein November 7, 1893, and is entitled to the seat in the Assembly of the State of New York, now held by him therein.

Dated *April 5*, 1894.

All of which is respectfully submitted.

GEORGE S. HORTON.

EUGENE F. VACHERON.

J. F. TERRY.

WESLEY GOULD.

PHILIP KECK.

Mr. Speaker put the question whether the House would agree to said report, and it was determined in the affirmative.

Ayes 98. Noes 00.

Assembly Journal, 117th session, 1894.

Case of William H. Friday and James Graham.

IN ASSEMBLY, TUESDAY, *January 2*, 1894.

Mr. Burtis presented the testimony in the matter of the intended contest of Wm. H. Friday against James Graham, for the office of member of Assembly for the sixteenth district of Kings county.

THURSDAY, *January 25*, 1894.

Mr. Keck, from the committee on privileges and elections, reported the evidence in the matter of the election contest of William H. Friday, contestant, against James Graham, contestee, of the sixteenth Assembly district of Kings county; which was laid upon the table and ordered printed.

WEDNESDAY, *February 14*, 1894.

Mr. J. F. Terry, from the committee on privileges and elections, presented the majority report in the matter of the election contest of William H. Friday, contestant, against James Graham, contestee, for the sixteenth Assembly district of Kings, which was laid upon the table and ordered printed. (See Document.)

On motion of Mr. J. F. Terry said report was made a special order for next Wednesday, immediately after the reading of the Journal.

Mr. Harrigan, from the committee on privileges and elections, made a minority report in the same case; which was laid upon the table and ordered printed. (See Document.)

On motion of Mr. Harrigan, said report was made a special order for next Wednesday, immediately after the reading of the Journal.

WEDNESDAY, *February 21, 1894.*

Mr. Speaker announced the special order of the day, being the majority and minority reports of the committee on privileges and elections in the matter of the contest for a seat in the Assembly from the sixteenth district of Kings county, between William H. Friday and James Graham, in the words following:

MAJORITY REPORT.

To the Honorable Assembly of the State of New York:

Your committee on privileges and elections present the following report in the matter of the contest for a seat in this Assembly from the sixteenth district of Kings county, between William H. Friday, contestant, and James Graham, contestee.

Your committee, after organization, appointed Messrs. Philip Keck, chairman; Wesley Gould and John Harrigan, a sub-committee, to make the investigation herein. They attended the several hearings in the city of Brooklyn, both parties appearing with counsel, and all evidence received was duly recorded, has been printed and made to form part of this report; William H. Friday, contestant, appearing with counsel, Messrs. George F. Elliott and William J. Young, and James Graham, the contestee, with counsel, Messrs. James P. Judge and Walter L. Durack. The evidence taken is very full, and it does not seem wise to burden our report with it at length, but to refer to it, from time to time, as may seem necessary to support our view of the case.

That the district contested includes the township of Gravesend, and there are six election districts in said township, numbered, respectively, one, two, three, four, five and six. That the registered lists of said town of Gravesend (as is evidenced by the documentary proof adduced in relation thereto), show that the number registered in said election districts, and notably in the second election district of the town of Gravesend, is largely in excess of the number permitted by law for an election district.

That previous to the election and after the registration lists were made out, an effort was made on behalf of certain republican candidates to investigate such registry lists, and to make copies thereof, every attempt at which resulted in failure by reason of the fact that the officers in charge of the said registration lists would not permit persons sent for the purpose of copying the same, to investigate the said lists or copy them.

That a large portion of the persons registered in the said second district, including the notable locality known as the "Bowery" (Coney Island), was composed of individuals who had no actual residence therein, and that in the said second election district aforesaid, as is shown by the poll list, the number of votes reported as cast was one thousand five hundred and twelve, all but ten of which were counted for the contestee, and not a single straight republican vote is recorded as being received in the entire poll.

That by the testimony it plainly appears that of this number (as was shown to your committee by the evidence of Michael P. Ryan), there were only about one hundred and seventy permanent voters in the said second election district, the balance being made up of a floating population, who illegally retained their residence for the express purpose of voting at all elections; a fact which singularly enough is admitted by the contestee in his answer, nay, is made part, if not the principal defense.

It is with regret, your committee feel bound to report that the watchers at the polls, together with the member of the executive committee of the republican party, who was also chair-

man of the republican town committee, was evidently in collusion with the election inspectors and the officials of the democratic party to prevent a fair election and an honest count.

It appears from the evidence received by your committee that one John Y. McKane is an important personage in the town of Gravesend. Among offices held by him is that of supervisor, chief of police, president and treasurer of the police board, and several other important positions, bearing a financial relation to the town of Gravesend.

That all, or nearly all, of the republican watchers at the polls were members of the John Y. McKane Association, and through the instrumentality of Mr. McKane, and by means of collusion with the republican watchers and inspectors of election of said town, gross frauds were perpetrated upon the elective franchise.

The evidence in this contest, which is before you, and to which this committee refers, shows a condition of affairs of a character calculated to destroy the free exercise of the elective franchise, nay more, to destroy our form of government.

We have been accustomed from time to time to read of the gross outrages committed in the Southern States upon its people in the attempted exercise of their right of suffrage, and to feel as American citizens a righteous sense of indignation, but this is the first instance in any Northern State where intimidation, conspiracy to defraud the people of their right of suffrage, combined with absolute brutality of assault upon those appointed to see that their rights were legally exercised, have been perpetrated; and these acts of brutality were not performed at night, but in broad daylight, and in face of and in spite of an injunction issued out of the supreme court of the State.

Your committee do not think they characterize the late election at the town of Gravesend in terms too strong when they say that it was a most corrupt scheme to defraud the people of their sovereign rights, and in disobedience to the orders of the court, as is conclusively shown by the opinion (which forms a part of the petition in this case) of the Hon. Joseph F. Barnard, late presid-

ing justice of the second judicial department (to which allusion has just been made) in which he points out that legally appointed watchers of the republican party were forcibly and brutally ejected from the polling place, and peaceable citizens anxious to secure a proper enforcement of the law, were forcibly ejected from the polling precincts and brutally maltreated.

That such a state of affairs could and did exist in a law-abiding community and among people claiming to be loyal American citizens, is not to the credit of the people of the Empire State, and your committee believe they voice the sentiments of the people of the State when they set the seal of their unqualified condemnation upon such proceeding.

The dominant party of this Legislature has always been in favor of a fair election and an honest count, and in every section of the country they have demanded that every citizen should have the right to vote as his reason and conscience dictated, and that every vote should be counted as cast.

It is our clear conviction that the contestant, William H. Friday, has established beyond peradventure that he received at the last election a clear majority of all the legal votes cast in the sixteenth Assembly district, and, by reason thereof, we are of opinion that fraud was concocted and carried out in all the election districts in the town of Gravesend, but beyond any rational dispute the one thousand five hundred and twelve votes recorded as having been received in the said election district were in a very large part fraudulent, and the entire vote from that district should be thrown out.

That the four hundred and seventeen votes which are recorded as the majority received by James Graham over William H. Friday, is a fraudulent majority, and should be wholly disregarded; and that James Graham should be deposed from his seat as member of Assembly from the sixteenth district, and the contestant, William H. Friday, declared elected, entitled to and awarded the seat.

And that the vote in said Assembly district on said candidates is as follows:

For William H. Friday	6,773
For James Graham	5,698
	<hr/>
William H. Friday's majority	1,075
	<hr/> <hr/>

All of which is respectfully submitted.

GEO. S. HORTON.
J. F. TERRY.
E. F. VACHERON.
PHILIP KECK.
JAMES R. SHEFFIELD.

Dated *February* 14, 1894.

MINORITY REPORT.

To the Assembly of the State of New York:

The undersigned minority of the committee on privileges and elections, to whom was referred the petition of William H. Friday, in which he claimed that he was elected Assemblyman from and to represent the sixteenth Assembly district of the county of Kings, State of New York, at the election held November 7, 1893, and by reason thereof, is entitled to the seat in this body held by Hon. James Graham, respectfully reports:

That the parties to the contest have appeared before the committee in person and by counsel, and the committee have heard all the testimony produced before it by both sides.

That the said Assembly district comprises the twenty-fourth, the first and the nineteenth districts, both inclusive of the twenty-fifth; the first district of the twenty-sixth ward, all in the city of Brooklyn, and the towns of Flatlands and Gravesend, of Kings county. That Hon. James Graham was a democratic candidate at the said election held on November 7, 1893, and as a result of that election, was awarded the certificate of election by the State and county board of canvassers.

That at said election, as set forth in the official canvass made of the vote by the board of canvassers, the total number of votes cast for said office was fifteen thousand two hundred and fifty-one, of which Hon. James Graham received seven thousand two hundred and William H. Friday, the contestant, six thousand seven hundred and eighty-three, and other candidates whose names appeared on tickets other than democratic and republican tickets, received one hundred and forty-nine votes, and that there were cast one hundred and nineteen blank or defective ballots.

That in the said sixteenth Assembly district, county of Kings, the plurality of Hon. James Graham, the contestee, over the contestant William H. Friday, as appeared from the official canvass of the board of canvassers, and a certificate of election held by the said Hon. James Graham, was four hundred and seventeen.

That the said William H. Friday, the contestant, claims the following as the ground upon which he claims the plurality of said James Graham is fraudulent, and his election illegal, and as his reasons why the said James Graham should be unseated, and the seat which he now occupies in this body be awarded to the contestant:

First. That in the second and third districts, in the town of Gravesend, there was a false and fraudulent registration, a fraudulent and illegal poll of votes and a false and illegal canvass of the votes; that a conspiracy existed between one John Y. McKane, chief of police and supervisor of the town, and one Anson M. Stratton, who was a republican executive representative, the object of such conspiracy being to deprive the republican party, and the legal voters of the town of Gravesend, and the sixteenth Assembly district of Kings county, of the free exercise of the right of franchise, to destroy the purity of election, to provide for a fraudulent majority for the said James Graham and other democratic candidates, and to prevent the election of your petitioner and other candidates of the republican party.

Second. That in the second district of the town of Gravesend there was a registration of two thousand four hundred and eight names reported and a certified vote therein of one thousand five hundred and twelve names.

Third. That the poll list of the said second district of the said town, upon examination, discloses the fact that persons presented themselves at the polling place and voted in numberless instances and voted in alphabetical order.

Fourth. On information and belief, that the canvass made in the second district of said town was devoid of any regard to the wishes of the legal voters in said town and district.

Fifth. That the registry lists in the second and third districts of the town of Gravesend consisted, for the most part, of names of persons who worked in said town for a brief period of time during the summer months only, as waiters, bartenders and dive-keepers.

Sixth. On information and belief, that in the town of Flatlands there were one hundred and eighty illegal votes cast by persons who represented themselves as residents of Barren Island, a part of said town, and that there are sixty-five legal voters on the said island who voted at the said election, and two others who failed to vote.

Seventh. On information and belief, that there were other illegal and fraudulent votes cast in that part of the said Assembly district which is in the city of Brooklyn.

(a) As to the first claim of fraud made by the contestant there is absolutely no evidence before this committee in support thereof. Under this claim the petition sets forth what purports to be a copy of an opinion rendered by Chief Justice Barnard of the Supreme Court, in a certain proceeding for an injunction in behalf of William J. Gaynor against John Y. McKane and others, to which proceeding the contestee, James Graham, was not a party. On the hearing before the committee a large number of affidavits, together with a certified copy of said opinion, were

offered in evidence by counsel for the contestant, and were objected to by counsel for contestee, and were admitted in evidence, the majority of the committee overruling the objection, and the minority of the committee sustaining it and dissenting from the conclusion of the majority of the committee. The grounds of the objection and reasons of the minority of the committee, given at the time of the reception of said affidavits and opinion, are set forth in full at page 20 of the printed record.

No testimony or proof was offered in support of said first allegation of fraud, or of the statements set forth in the opinion of Mr. Justice Barnard, and, at the closing of the hearing before the committee, all the said affidavits and opinions were stricken from the record on motion of counsel for the contestant, the committee being unanimous in its decision. This absolutely disposed of the contestant's first allegation of fraud, and left it entirely unsupported by competent testimony or proof.

Contestant's second allegation of fraud is embraced within subdivision 1 of allegation 8 of his petition. In this allegation he alleges that it was a physical impossibility to vote one thousand five hundred and twelve votes during the entire legal election day of November 7, 1893, or to poll ten, twelve or one thousand five hundred votes in the manner prescribed by law; that in the second election district of Gravesend the votes, as certified by the election officers, consisted in part of ballots cast before the polls were legally opened, by some person or persons unknown to petitioner, such ballots being cast in bulk, in part of ballots cast by non-residents, floaters and repeaters, and the small remaining part by persons, residents of said town, who feared to exercise a free and untrammelled choice by reason of the cast-iron dictation of the said John Y. McKane.

Taking the allegation as a whole, there is absolutely no testimony or proof, legal or otherwise, which could warrant this committee in finding any of the wholesale charges of corruption and fraud to be true. In arriving at this conclusion, the committee has taken into consideration the method in which the contestant

attempted to prove that it was a physical impossibility to vote the number of votes certified to by the proper officials, as having been cast in the second election district of the town of Gravesend. The only testimony offered was that of the republican inspector, Ogden, and his assistants, as to a certain so-called test made by republicans at a Republican club after the election, on the night before the day on which they testified before the committee, after having been requested by counsel for the contestant to make such test in order to qualify themselves as witnesses in support of the claim of the contestant.

If the so-called test were not in itself sufficient to prove the utter fallacy of the contestant's contention, certainly the manner in which and under the circumstances under which it was had and the motives which prompted it, the political character of the persons who made it, and the surroundings of the place where it was made, all these taken in connection with the admitted lack of knowledge of the election laws of the parties who participated in the contest, and the hostile and partisan manner in which they gave their testimony before the committee, were more than sufficient to satisfy the committee that the contestant was endeavoring to establish his allegation of fraud by mere unwarranted influence, rather than by positive and direct proof.

This testimony was all objected to by the counsel for the contestee and was certainly improperly admitted in evidence, and if no other reasons appeared before the committee, could not possibly be construed, even by the most partisan investigator, as being of sufficient weight or importance to give the slightest credence or support to the claim of the contestant. But taking the evidence, and whatever influence might be drawn from it in its most favorable light, so far as the claim of the contestant is concerned, the rebuttal testimony of a test, conducted before this committee, and under other circumstances so dissimilar from those attending the so-called test, were sufficient, and did absolutely negative, disprove and rebut any presumption or inference of fraud which the unfair

test conducted by the contestant, his counsel and partisan election inspectors, could have created in the minds of the committee. This contest was made by the contestee not for the purpose of showing or proving that it was possible to vote a certain number of votes within a specified time, nor was it received for that purpose, but, on the contrary, was made and received to show the utter unfairness and unreliability of the test made by the contestant. This it certainly did, by proving that it was possible, under the circumstances witnessed by the committee, to poll one hundred and thirty-four votes in thirty minutes, and at the same rate would have been possible to vote two thousand seven hundred votes within the period of time during which the polls were open on election day of November 7, 1893.

Therefore, it follows from this, and as the direct, immediate and only fair conclusion that could be arrived at by the committee from the evidence of the contest conducted by the contestant and his counsel and the ocular demonstration of the test furnished by the contestee, in rebuttal, that the contestant's claim of fraud in respect to the number of men voted was entirely unsupported by testimony and devoid of all truth.

The contestee, however, did not rest by proving the test of the contestant to have been unfair and worthless, but went further and proved to the satisfaction of the committee, that in the town of Flatlands, in 1893, there were polled one thousand six hundred and eighty-five legal votes. This evidence remains uncontradicted by the contestant, and is certainly conclusive proof, first, that the test made by the contestant was improper, unfair and worthless; and, second, that it is, and was, possible to vote one thousand five hundred and twelve ballots in the second district of the town of Gravesend on election day of November 7, 1893. If, for a moment, it could be contended, that the experimental evidence offered by the contestant was of sufficient weight or value to establish his claim of fraud, certainly the absolute facts proven by the returns of the vote cast in the town of Flatlands, rebutted

and did away with such presumption, and left the contestant's claim without presumption, evidence or proof to support.

(b) As to the remaining part of said subdivision I of allegation 8 of contestant's petition, it was entirely devoid of evidence or proof, legal or otherwise, to sustain it. In fact, no evidence or proof was offered by contestant to support any of his claims of alleged fraud. On the contrary, the evidence is, and the proof is absolute and uncontradicted, that no ballots were cast before the polls were opened, by some person or persons known or unknown; that there were not any "ballots cast in bulk;" that there were not any ballots cast by "non-residents, floaters and repeaters," and that there were not any "ballots voted by persons who feared to exercise a free and untrammelled choice by reason of the cast-iron dictation of John Y. McKane."

The only testimony in the record, and that testimony has been given by every democratic and republican inspector who served in their official capacity at the polling place in the second election district of the town of Gravesend on election day, is that the boxes were examined before the voting commenced, and found to be empty; that the ballots were cast by residents of the town of Gravesend, men who had a legal right to vote therein, who had legally registered, and whose names had appeared on the registry books, and that the ballots so cast by said legally entitled voters were cast and voted without intimidation or hindrance by or from John Y. McKane or any other man or men.

The contestant did testify to a conversation had with one voter, Charles Goodfellow, a republican inspector, who, he claimed, told him that if he voted for him, said Friday, he would have his house burned, but this conversation is flatly contradicted by the said Goodfellow, and in view of the fact that the contestant is an interested party, having every incentive to at least misstate conversations had with persons in reference to his election, and as he has testified to other conversations had with other parties of his own political faith, and in every instance these conversations, as testified to by

the contestant, have been contradicted by the parties alleged to have made the statements attributed to them, the committee are of the opinion that the claim of the contestant in that respect is unfounded or at least has not been sufficiently established. But even granting him the benefit which might accrue to him if such facts contained in such alleged conversations were true, the result of the vote in the town of Gravesend would only be changed by making the majority of Graham four hundred and sixteen instead of four hundred and seventeen, and as such change would not be sufficient, in fact or in law, to invalidate the election of said James Graham, the committee find against the contestant.

That the second subdivision of allegation eight of contestant's petition, viz.: That the poll list of the said second district of the said town, upon examination, discloses the fact that the persons presented themselves at the polling place and voted in numberless instances in alphabetical order, is utterly unsupported by any testimony or proof, and for that reason the committee find adversely to the contestant.

That the only testimony offered before the committee in reference to the third subdivision of allegation eight shows conclusively and provides beyond the possibility of a doubt, that the canvass of votes was properly made, was entirely reliable, and consumed such a space of time as makes the committee believe that sufficient and adequate time, care and attention were devoted by the election officials in the performance of their duties as canvassers, and as a result thereof the canvass made by them was a fair and legal one.

That the evidence in reference to the fourth subdivision of said allegation eight, while not so strong as the language used in the allegation, is still of so much weight as to convince the committee that the persons whose names appeared on the registry list of the town of Gravesend were not men who did not have a legal right to vote, because they were waiters, bartenders and divekeepers; but, on the contrary, were legal residents of the town of Gravesend, and as such were properly registered and entitled to cast their vote in said town.

The committee arrives at this conclusion from the fact that the registry books and the official return of the vote cast are conclusive upon them, as to the right of the persons named in the registry list and in the official returns of the vote in Gravesend, unless the fact of such residence is contradicted and rebutted by competent and proper evidence and proof.

No such evidence having been offered or proof given before the committee they find adversely to the contestant.

That the committee deemed it necessary to refer to the fifth and sixth subdivisions of said allegation eight of contestant's petition further than to say that as no evidence was offered by contestant in relation to said subdivision nor attempt made by him to substantiate the charges made therein that such charges must be taken as unfounded and, being impossible to be proven by petitioner, therefore, are found against him.

That the conclusions arrived at by the majority of the committee are contrary to the facts and evidence produced before the committee, contrary to law, justice and good government, and, as the cause of the contestant is entirely unproven, the minority of the committee, in place of the resolution offered by the majority of the committee, offers the following as a substitute:

Resolved, That the petition of William H. Friday, claimed to be elected Assemblyman of the sixteenth Assembly district of the county of Kings, State of New York, be and the same is hereby dismissed, as the allegations therein contained have not been proven; and be it further,

Resolved, That by virtue of the ballots of seven thousand two hundred American citizens, voted by them in the sixteenth Assembly district of the county of Kings, State of New York, on the 7th day of November, 1893, and by virtue of the certificate of election awarded to James Graham, declaring him to be elected member of Assembly for the sixteenth Assembly district of the county of Kings, State of New York; the said James Graham has been

legally elected to the said office and is legally entitled to his seat in this body.

Dated ALBANY, *February 14, 1894.*

JNO. C. HARRIGAN,
HENRY McNAMEE.
VICTOR J. DOWLING.

WEDNESDAY, *February 21, 1894.*

The reports having been read,

Mr. Ainsworth moved an open call of the House.

Mr. Speaker put the question whether the House would agree to said motion, and it was determined in the affirmative.

Debate being had thereon.

Mr. Ainsworth offered for the consideration of the House a resolution, in the words following:

Resolved, That James Graham be deposed from the seat now occupied by him as member of Assembly from the sixteenth Assembly district of the county of Kings, and that William H. Friday be declared elected such member of Assembly, and that said seat be awarded to him, the said William H. Friday.

Mr. Sulzer offered the following substitute:

Resolved, That the petition of William H. Friday, claimed to be elected Assemblyman of the sixteenth Assembly district of the county of Kings, State of New York, be and the same is hereby dismissed, as the allegations therein contained have not been proven; and, be it further

Resolved, That by virtue of the ballots of seven thousand and two hundred American citizens, voted by them in the sixteenth Assembly district of the county of Kings, State of New York, on the 7th day of November, 1893, and by virtue of the certificate of election awarding to James Graham, declaring him to be elected member of Assembly for the sixteenth Assembly district of the county of Kings, State of New York; the said James Graham has been legally elected to the said office, and is legally entitled to his seat in this body.

Mr. Ainsworth moved the previous question.

Mr. Speaker put the question "Shall the main question be now put?" and it was determined in the affirmative.

Mr. Speaker then put the question whether the House would agree to said resolution of Mr. Sulzer, and it was determined in the negative.

Ayes, 51. Noes, 69.

Assembly Journal, 117th session, 1894.

Case of Stillman F. Kneeland and William Hughes.

IN ASSEMBLY, TUESDAY, *January 2, 1894.*

Mr. Ainsworth presented the petition and testimony in the matter of Stillman F. Kneeland, contesting the seat occupied by Wm. Hughes as member of Assembly for the seventh district of Kings county; which were ordered printed and referred to the committee on privileges and elections.

MONDAY, *March 26, 1894.*

Mr. Horton, from the committee on privileges and elections, presented a report in the matter of the contested seat, Kneeland v. Hughes; which was laid upon the table and ordered printed. .

(See document.)

TUESDAY, *April 3, 1894.*

Mr. Harrigan presented a minority report of the committee on privileges and election in the matter of the contested seat in the Assembly, for the seventh district of Kings county, between Stillman F. Kneeland, contestant, and William Hughes, contestee, which was laid upon the table and ordered printed. (See Document.)

WEDNESDAY, *April 4, 1894.*

Mr. Speaker announced the special order, being the majority and minority reports of the committee on privileges and elections in the matter of the contest for a seat in the Assembly, from the seventh district of Kings county, between Stillman F. Kneeland, contestant, and William Hughes, contestee, in the words following:

To the Honorable Assembly of the State of New York:

Your committee on privileges and elections present the following report in the matter of the contest for a seat in the Assembly from the seventh district of Kings county between Stillman F. Kneeland, contestant, and William Hughes, contestee.

Your committee, after organization, appointed Messrs. Philip Keck, chairman, Wesley Gould and John Harrigan a sub-committee, to make the investigation herein. They attended the several hearings in the city of Brooklyn, both parties appearing with counsel and all evidence received was duly recorded, has been printed and made to form part of this report.

Stillman F. Kneeland, the contestant, appeared in person, with George F. Elliott, Esq., as counsel.

William Hughes, the contestee, appeared in person, with Thomas F. Magner, Esq., as counsel.

The evidence has been printed and is submitted herewith. It appears from the testimony that the seventh Assembly district of Kings county is made up of the entire ninth ward, the thirtieth, thirty-first and thirty-second election districts of the seventh ward, and the first fourteen districts of the eleventh ward.

According to the official count, this Assembly district cast for Mr. Hughes, the contestee, five thousand five hundred and ninety-one votes, and five thousand five hundred and four for the contestant, Stillman F. Kneeland, thus electing Mr. Hughes by the apparent majority of eighty-seven. However, it appears, and is not disputed, that by the erroneous omission of the word "twenty" in the clause "two hundred and twenty-six," contained in the returns of the second district of the eleventh ward, the contestant suffered a loss of twenty votes which should be counted for him. And through the omission of five votes that were attached to the return in the seventh district of that ward, but which were improperly omitted from that count, as being defective, the contestant suffered a further loss of five votes in that district, one of which, however, is offset by a like error in the omission of a vote that should

be counted for the contestee, making the total omission in this respect four votes to which the contestant is entitled, or the aggregate of twenty-four votes, which reduces the apparent majority in favor of the contestee from eighty-seven to sixty-three.

It further appears from the undisputed testimony that the returns as originally filed in the police precincts in that Assembly district gave a majority to the contestant. In view of the fact of apparent errors on the face of the official returns in that district, much force must be given to this original statement of the canvass, in which no specific inaccuracy has been shown.

It further appears and we do find and report, that grave frauds and irregularities dominated and controlled several election districts in the ninth and eleventh wards, to wit, the seventh, thirteenth and fourteenth districts of the eleventh ward, and the third, fourth, fifteenth and sixteenth districts of the ninth ward. The specific acts of fraud in these districts are in part as follows: In the seventh district of the eleventh ward eighteen persons took the benefit of the disability clause of the Election Law. These persons nearly all claimed blindness, and took the statutory oath necessary to receive assistance upon that ground. As a matter of fact, they were not blind, to the knowledge of the inspection officers at the time.

In the thirteenth district of the eleventh ward seventeen persons voted as blind men, taking the necessary oath for that purpose, and with the possible exception of one, none of these persons, to the knowledge of the election officers in the seventh district, were blind.

In the thirteenth district of the eleventh ward a large number of persons took the benefit of the act relating to disability, but the total number thereof cannot be accurately stated, as with the exception of five voters, the record thereof was omitted from the poll list. From memoranda taken at the time by the republican inspectors, we have the names of seventeen persons who have voted and the fact also that none of them were blind. In this

district the statutory oath was not given to the persons claiming the benefit of the act. On the contrary the person who acted as chairman of the board of inspectors gave a form of oath that was a mere mockery of the law, the applicant being required to hold up his hand and assent to a mere confusion of unintelligible words. In this, as well as in most of the other districts hereinbefore referred to and hereafter to be referred to, the claim of disability in many instances was made at the suggestion, not of the voter, but of the democratic workers or election officers. In this fourteenth election district we further find from the testimony that one Justice Haggerty, a police justice, residing in that district, while acting as a democratic watcher, continuously throughout the day forced his way into the booths while the persons who had not taken the disability oath were preparing their ballots, and openly and in defiance of law thus inspected the votes cast by the voters in that district. This was done against the protest of the Republican inspectors and with the apparent consent and connivance of the democratic chairman of the board. It further appears that this same police justice in several cases where the voter claimed that he could not read nor write, suggested to him that he could not see, and, after the voter took the form of oath hereinbefore specified, went with him into the booth. It also appears that in the canvass of votes in this district seven were thrown out as defective, but the said votes were not attached to the official return from the said district, nor was there any evidence preserved of the facts which constituted the alleged defect, although the pages in which these votes should be placed in the returns were signed by two or more of the inspection officers, the place above the signature being absolutely blank. We find that it would be impossible to state and compute the exact number of votes that were cast in this district in defiance of the provisions of the statute, and that the frauds committed therein are of such a character as, in our opinion, requires that the entire vote of the district should be thrown out.

In the third district of the ninth ward two hundred and ~~thirty~~ three votes were cast, of which twenty-three, or about one-tenth, took the benefit of the disability clause in the election laws. Nearly all of these persons claimed blindness or defective eyesight, and none of them were, in fact, blind.

In the fourth district of the ninth ward the number specified in the poll list as having been assisted on account of defective eyesight or blindness is thirteen, but it appears from the testimony that not all of those who took the benefit of the act had their names registered in the poll list as having taken the same, and that in fact from fifteen to twenty-five were so assisted. None of these persons were required to state in the oath, that they were blind. All that the democratic chairman of the board of inspectors stated in the oath given was that their eyesight was affected; there appears to have been an intentional evasion of the statute in this respect.

In addition thereto a democratic worker in this district entered the booths without regard to the taking of any oaths of the voters, and entirely disregarding the requirements of secrecy. This was done during the entire day, and it is impossible to state how many votes should be cast out as having been fraudulently inspected by third parties in that district. It appears further that electioneering was carried on within the polling place continuously; that pasters were given inside the polling place by the democratic captain of the district to voters during the entire day, notwithstanding protest on the part of republicans. We find further that in this district persons were registered and voted from houses where they did not reside that one person voted twice in the same district, on one name, once in the forenoon and once in the afternoon; that two other persons voted in the name of third parties in the morning and the original parties appeared in the afternoon and voted the same name over again. There seems to have been an utter and entire disregard of the requirements of the statute in this district, and we find and state

our opinion to be that the ends of justice can only be met by **throwing** out the entire vote of the district, it being impossible to state the specific number of fraudulent votes cast therein.

In the fifteenth district of the ninth ward nearly every requirement of the statute relating to the purity and due observance of elections was flagrantly and intentionally disregarded. The democratic headquarters of the ward was placed next door to the polling place with only a single lot of less than thirty feet intervening. Electioneering was carried on during the day, not only in these headquarters, but in the entire space from the gateway through the railing, inside of the polling place to the street, such space being filled at all times with a mass of persons wearing the badge of the democratic general committee, who was electioneering and giving out pasters. The ballots were not cast in the manner prescribed by law. For a considerable time after the opening of the polls the voters took their ballots and went into the booths without even announcing their names, and without giving any statement of their identity until after they appeared with the folded ballots ready to vote. The ballots were not given in the proper order; instead of being handed out numerically, commencing with the lowest number, they were given in converse order, commencing with the highest number. The watchers of the republican party were not allowed to pass inside the rail, and as a consequence they were not guarded from attack by the crowd of Democratic workers. The republican watcher who first challenged a voter was knocked down and dragged out of the building without any protection from the policeman who stood by his side and who refused to arrest the assailant. Repeated demands were made on the behalf of the republican candidates for the watchers to be permitted to pass inside of the rail, but these demands were persistently refused. A large number of persons took the benefit of the Disability Act, but it was impossible to state how many, for the reason that, contrary to law, no mention thereof was made upon the poll list

The testimony shows that at least fifteen so voted, and that none of that number were blind, although they claimed the privilege of so voting on that ground. It further appears that in this district persons voted in the names of absentees. And that, although a large number of persons were challenged, the preliminary oath was not given to any of them, the only oath administered being the final or general oath. It also appears that after the close of the polls a large number of people were inside the railing who had not voted, but were then permitted to cast their ballots under protest. And that at the close of the polls all persons excepting election officers and watchers were turned out of the building and the canvass was thereafter made behind locked doors, with the watchers outside of the rail; this was also done under protest. We are of opinion and do respectfully find and report that it is impossible to state the total number of votes fraudulently cast in this district; that the entire machinery of the district and the conduct of the election was corrupt and illegal; and that the vote of the district should be thrown out for actual fraud.

In the fifteenth district of the ninth ward the republican watchers were continuously threatened and assaulted, and one of them was driven from the building for the alleged reason that the republicans were entitled by right to but one watcher. That during the entire day the police officer charged with the suppression of crime and the enforced observance of the due administration of affairs, himself openly violated the law by passing from one booth to another, holding a lighted candle within the booths under the alleged pretense of furnishing the voters with light in the preparation of their ballots. It further appears that a large number of persons took the benefit of the Disability Act under the false claim of blindness; that such persons did not take the disability oath, but simply the general oath specified in section 111 of the Election Law. That in this and another district a gang of Italian voters registered and voted who did

not reside in either of the districts, and who had previously registered and voted in the twenty-second ward. We are of opinion and do find that every vote cast, which is not a secret ballot, unless the voter was either absolutely disabled or totally blind, is a fraudulent vote and should not be counted for either party; that the extent to which such votes were cast in this district cannot be computed, and that the entire vote of the district should be thrown out.

We do further, on due consideration, find and state that the voters who fraudulently cast their votes as blind persons, as hereinbefore specified in the seven districts named were assisted, aided and abetted by the officers and workers of the Democratic party, and that all such votes are fraudulent and should be deducted from the votes cast for that party, including the contestee herein.

Your committee further find and state that in their opinion a conspiracy was entered into before the election by the Democratic leaders in the ninth and eleventh wards, included in the seventh Assembly district. That a part of this conspiracy consisted in false registration; in the procuring of assistance in the preparation of ballots for the voters for the purpose of ascertaining that the vote was cast for the Democratic ticket; in the repeating of vote by the same voter, and in securing persons to vote in the name of absentees. As proof of this general scheme we submit the following facts:

In the ninth ward, under the directions of the ward leader, nearly all of the colored voters, some eighty in number, were banded together under an arrangement that they should vote for the Democratic ticket and be paid for their votes. That under this arrangement several of the persons voted in the name of third parties; several of them repeated their own votes, and all of them who so voted received for each vote cast a ticket or check with instructions to appear at the Democratic headquarters after the polls had closed and receive their compensation; that they did so appear and receive from one of the Democratic leaders in the private room of such headquarters, in return for each check so presented, an

envelope containing three dollars in currency, which was the sum agreed upon to be paid for their vote.

Again we find and state that the registration in the strongest Democratic districts of the ninth ward was increased largely over the vote for the presidential year of 1897. Specific instances of this increase we find to have been the result of colonization from other districts, and we believe and find that this increase was, to a large extent, fraudulent.

We further find and state that the contestant, Stillman F. Kneeland, received the largest number of votes legally cast, and is entitled to his seat; that the contestee, William Hughes, is not entitled thereto.

And that the official count of the said Assembly district should be changed and stated as follows, to wit:

The official count gives Hughes..... 5,591

There should be added for a vote in his favor counted as defective 1

There should be deducted his entire vote in the fourteenth district, eleventh ward..... 207

Also, in fourth district, ninth ward..... 208

Also, in fifteenth district, ninth ward..... 316

Also, in sixteenth district, ninth ward..... 202

Also, at least 12 votes each in the seventh and thirteenth districts, eleventh ward, and the third district, ninth ward..... 36

969

4,623

Kneeland's official vote was..... 5,504

To this should be added 20 votes omitted by mistake in the second district of eleventh ward and 5 voted erroneously, counted as defective..... 25

5,529

And there should be deducted the vote cast for him in the following districts:

Fourteenth district, eleventh ward.....	72
Fourth district, ninth ward.....	62
Fifteenth district, ninth ward.....	124
Sixteenth district, ninth ward.....	39
	<hr/> 297
	<hr/> 5,232
Deduct Hughes' vote.....	4,623
	<hr/>
Leaving as Kneeland's majority.....	609
	<hr/> <hr/>

We do hereby recommend the adoption of the following resolution:

Resolved, That Stillman F. Kneeland was at the last general election elected to the office of member of Assembly for the seventh Assembly district of the county of Kings, which seat is now held by William Hughes, and that the said Stillman F. Kneeland be and he is hereby awarded the same.

All of which is respectfully submitted.

GEO. S. HORTON.

EUGENE F. VACHERON.

PHILIP KECK.

WESLEY GOULD.

J. F. TERRY.

JAMES R. SHEFFIELD.

Dated, March 26, 1894.

MINORITY REPORT.

To the Honorable, the Assembly of the State of New York:

The undersigned members of the committee on privileges and elections, after having heard the counsel for the respective parties in the above entitled matter, and upon examination of the proofs offered in behalf of each party and of the law applicable thereto, respectfully find and report as follows:

That, according to the official count, Mr. Hughes, the sitting member, received five thousand five hundred and ninety-one votes and Mr. Kneeland, the contestant, five thousand five hundred and four votes, which gives Mr. Hughes a majority of ninety-seven votes. That each of the official returns was signed by two members of the Republican party and two members of the Democratic party, who acted as canvassers and canvassed the total vote. That the canvass was made in the presence of one Republican watcher and one Democratic watcher in each election district, and the canvassers were assisted by an equal number of Republican poll clerks and Democratic poll clerks. That the polling places were selected, one-half by representatives of the Republican party in the city of Brooklyn and one-half by representatives of the Democratic party, and all the election officials were equally divided between both parties. That there were three sets of returns made, signed by all the canvassers, one of which reports was filed in the police department, one in the board of elections and the other with the county clerk of the county. That on the face of all the returns a clear majority was given for Mr. Hughes of sixty-seven votes. That according to the return filed with the county clerk, Mr. Hughes received twenty votes more than appeared on the face of either of the other two returns. That afterwards it was discovered that, according to this report, Mr. Hughes was credited with having received twenty votes more than he actually did receive, and a statement to such effect was made by Mr. Hughes' counsel before the committee, and said report was corrected accordingly. That this allowance in favor of the contestant, together with four additional ballots, returned as defective, gives Mr. Hughes a clear majority of legal votes cast to the number of sixty-three, by which majority Mr. Hughes legally claims to have been elected, and by reason of such entitled to hold his seat in this body.

Your committee further reports that there is no proof whatsoever, nor was any testimony offered, that the official returns of the police department ever showed that the petitioner received five thousand four hundred and ten votes, and the contestee five thousand

three hundred and forty-two votes, as alleged in the fourth allegation of said petition.

Your committee further reports that some testimony was offered by the contestant as to what he had read in the public press of the cities of Brooklyn and New York, as to his being elected to the seat now held by the contestee, by sixty-seven votes, but your committee, with all due regard to the impression which such reading made upon the mind of the contestant, and the feeling created thereby, and also having due regard to the disappointment which such erroneous notices must have caused the contestant, cannot see their way clear to report to this body that by reason of such notices, the contestant has been elected a member of this House, in view of the fact that the official returns heretofore mentioned show the contestee to have a majority of sixty-seven votes over the contestant; and on the further ground that the election law of the State of New York makes no provision for the election of a man who did not receive the greatest number of votes, even though the public press should publish a statement to the contrary. And your committee will further report in this connection, that it is within the memory of one of its members that similar notices appeared in certain New York newspapers in reference to his election, and when the count was completed and made official thereafter, the said newspapers not only corrected their statement in that regard, but also the opponent of the member in question conceded his defeat and made no attempt to obtain a seat to which he was not entitled even though his political party were in power, and thus demonstrated the fact that although newspapers should at times inadvertently make a statement which they afterwards corrected as in this case, that he, unlike this contestant, would uphold the legal and equitable principle applicable to all elections in this great commonwealth, "that the man receiving the greatest number of legal votes shall be regarded as the legal representative of the people."

Your committee further finds that the county board of canvassers of Kings county did make correction in the returns made by the election district canvassers, but that such corrections so made by said county board of canvassers were made according to law

and justice, and when so made the returns represented and showed the exact number of legal votes cast for the respective candidates, including the contestant and contestee for the office of member of Assembly in the seventh district of Kings county, no change having been made in the number of votes cast, but simply certain inaccuracies corrected in the manner in which said votes, and the count thereof, were set forth in said returns.

Your committee further reports that so far as the testimony and proof offered in respect to the facts set forth in the seventh allegation of contestant's petition, the same is absolutely untrue, for the reason that such testimony and proof show that the workers, inspectors, poll clerks, ballot clerks, watchers and challengers of both parties were alike treated with all due consideration, and were not threatened, or assaulted, or in any manner prevented from performing their respective duties, and protecting the rights and interests of their respective parties and candidates, and in proof of such facts refer to the testimony of the various officials sworn on the investigation.

Your committee further reports that the facts set forth in the eighth allegation of contestant's petition are likewise unsupported by any evidence or proof, and are entirely unworthy of belief, and in support of this assertion not only refer to the testimony generally, but also would call the attention of this body specifically to the fact that in the districts in which it was sought to prove such facts the official count shows on its face that the contestant ran ahead of the rest of his ticket in the number of votes received, while on the other hand, in the other districts in which no claim of fraud or intimidation was made, the said contestant ran behind and received a less number of votes than other members of his party who were candidates for office on the same political ticket.

Your committee further reports that no testimony or proof was offered in support of the facts set forth in the ninth allegation of the petition which could, by any possibility of construction, lead any fair-minded man to believe that the facts therein stated were true, but on the contrary, it appears that while some testimony was

offered by persons, whose testimony, to say the least, should be viewed with suspicion and be entitled to little if any credence, show slight irregularities in the method of procedure, and the administration of the various oaths; still, if true, it conclusively appears that such irregularities were participated in by the representatives of both political parties, namely, the republican and democratic parties, and that the same were committed, if committed at all, not with any design or intent to deprive the contestant of any of his legal rights or to violate the Election Law in any particular, but were, as the testimony showed, committed in ignorance of law and did not in any manner affect the result.

That in respect to the tenth allegation of the petition, the same is absolutely void of all evidence or proof tending to support the same, and for that reason your committee finds against the contestant; and for the same reasons which clearly appear from the testimony, your committee finds the facts stated in the eleventh and twelfth allegations of said petition to be utterly unfounded, and made, in most instances, without as much as a scintilla of evidence, legal or otherwise, to support them.

Wherefore, we respectfully report for adoption the following resolution instead of that reported by the majority of this committee:

1. *Resolved*, That William Hughes was, on the 7th day of November, 1893, duly elected member of Assembly for the seventh Assembly district of Kings county, New York, having received a clear majority of sixty-three of all the votes cast for the various candidates for such office, and by reason of such election that he has held and is legally and equitably entitled to hold his seat in this House.

2. That the petition of Stillman F. Kneeland, praying that he be declared entitled to the seat in this House now held by the said William Hughes, be denied.

JNO. C. HARRIGAN.

VICTOR J. DOWLING.

Dated ALBANY, N. Y., April 2, 1894.

Mr. Sulzer moved that the minority report be substituted for the majority report.

Mr. Howe in the chair.

Debate being had, Mr. Ainsworth moved that the debate on the question of the contested seat be limited to one speech of fifteen minutes' duration on each side.

Mr. Ainsworth moved the previous question.

Mr. Speaker put the question, "Shall the main question be now put?" and it was determined in the affirmative.

Ayes, 62. Noes, 50.

WEDNESDAY, *April 4*, 1894.

Mr. Sulzer offered the following substitute for the recommendation of the majority of the committee on privileges and elections:

1. *Resolved*, That William Hughes was on the seventh day of November, 1893, duly elected member of Assembly for the seventh Assembly district of Kings county, New York, having received a clear majority of sixty-three of all the votes cast for the various candidates for such office, and by reason of such election that he has held and is legally and equitably entitled to hold his seat in this House.

2. That the petition of Stillman F. Kneeland, praying that he be declared entitled to the seat in this House now held by the said William Hughes, be denied.

Mr. Speaker put the question whether the House would agree to said resolution and it was determined in the negative.

Mr. Speaker put the question whether the House would agree to the resolution reported by the majority, and it was determined in the affirmative.

Ayes, 73. Noes, 52.

Mr. Speaker declared Stillman F. Kneeland entitled to the seat formerly occupied by William Hughes.

The oath of office was administered by the Speaker to Stillman F. Kneeland as member of Assembly from the seventh district of Kings county.

Assembly Journal, 117th session, 1894.

Case of Charles La Maida and Thomas J. O'Donnell.

IN ASSEMBLY, TUESDAY, *January 2, 1894.*

Mr. Sheffield presented the petition of Chas. La Maida, contesting the seat now held by Thomas J. O'Donnell as member of Assembly for the eighth district of New York county; which was referred to the committee on privileges and elections.

THURSDAY, *February 15, 1894.*

Mr. J. F. Terry, from the committee on privileges and elections, made the following report:

In the matter of the contested seat of Thomas J. O'Donnell, of the eighth Assembly district.

To the Honorable, the Assembly of the State of New York:

The committee on privileges and elections do respectfully report to the Assembly in the matter of the contest in relation to the seat of Thomas J. O'Donnell, of the eighth Assembly district, as follows:

That on the 8th day of January, 1894, at the city of New York testimony was duly taken and proceedings duly had before said committee upon notice duly given to Thomas J. O'Donnell, Esq., and to Charles La Maida, the contestant, and both of the parties to the contest together with their respective counsel, appeared before your committee on said date, Mr. O'Donnell being represented by Hon. Wauhope Lynn, and Mr. La Maida by Mr. Lucas L. Van Allen.

It appeared that the facts in this matter were undisputed and were as follows:

That at the time of the election of Mr. O'Donnell to the office of member of Assembly, he was employed by the sheriff of the city and county of New York as a special deputy sheriff,

whose duties were to act as peace officer, and to convey prisoners back and forth to Sing Sing State Prison and Blackwell's Island, at a salary of \$1,500 per annum, which salary he had received up to the 31st day of December, 1893.

It was claimed by the contestant that under article 3, section 8 of the State Constitution, which provides that "No person shall be eligible to the Legislature who at the time of his election is, or within one hundred days previous thereto, had been an officer under any city government."

Two questions were therefore presented for decision by your committee.

First. Was Mr. O'Donnell an officer?

Second. Was he an officer under any city government at the time of his election, or within one hundred days prior thereto?

In our opinion both of these questions must be answered in the negative.

Sheriffs are elected under article 10 of the State Constitution and are authorized by one Revised Statute 379, section 73, to "appoint such and so many deputies as they may think proper, and persons may also be deputized by any sheriff by an instrument in writing to do particular acts."

It is provided by section 74 of the same chapter of the Revised Statutes, that the appointment of a deputy sheriff should be in writing under the hand and seal of the sheriff, and the deputy should take the oath of office prescribed in the Constitution, "but this section shall not extend to any person who may be deputized by any sheriff to do a particular act only."

As to the city and county of New York, chapter 523 of the Laws of 1890, limits the number of deputies to be appointed by the sheriff to twelve at a salary of \$2,500; also, it authorizes the appointment of an assistant to each deputy at a salary of \$1,000 per annum.

No provision is made for the appointment of a special deputy sheriff, but it is provided in section two of the act "that the num-

ber of duties of all the clerks *and other employees* to assist in the office of the sheriff of the city and county of New York who are to be compensated out of the treasury of the city of New York, shall be such as he shall designate and approve, subject to the revision of the board of estimate and apportionment in said city as to number, classification and compensation of such clerks and assistants."

Mr. O'Donnell being clearly neither a deputy sheriff nor an assistant, if he was legally employed in the sheriff's office must have been one of the "clerks and other employees" mentioned in the act.

It certainly cannot be said under the decisions of the courts which on this question are uniform, that a person so subordinate in position and fulfilling duties of such a character can be called an "officer."

Mr. O'Donnell did not hold his appointment from the city, but from the sheriff; his duty did not relate to the welfare and interest of the city, but of that of the people of the entire State in the enforcement of the mandates of the law. He took no oath of office as do the sheriff and the deputies, nor did he file any bond, nor was there any fixed duration of his appointment; he could be removed by the sheriff at will, nor would such removal cause any vacancy.

It was said in a case cited to us by counsel, *Collins v. The Mayor*, 3 Hun, 680, by the Supreme Court at General Term, in discussing the office of assistant clerk to the board of aldermen, probably the *true test to distinguish officers from simple servants or employees is in the obligation to take the oath prescribed by law*, the number of deputies was not prescribed by law, it might be more or less according to the exigencies of business and to be regulated by ordinances of the common council, which must be presumed to be passed with a view to such exigencies."

Another case may be also cited, *Olmstead v. The Mayor*, 42 Super. 481, where the General Term of the Superior Court of

the city of New York held that even a landscape gardener employed in the department of public parks in the city of New York was not an officer.

Many other cases might be cited, but we apprehend this question is sufficiently clear to render such citation unnecessary.

The second question to be considered in this matter is, even if it might be said that Mr. O'Donnell was an officer, whether he was such an officer under "any city government" so as to bring him within the prohibition of the Constitution.

On this question, too, the authorities are uniform, and on examination of the charter of the city of New York, that is, the Consolidation Act as passed in 1882, shows there are grouped in one chapter (21) under the head of "county officers" a *sheriff*, a county clerk, a register and the coroners, all officers who have nothing to do with the government of the city.

It has always been said that the office of sheriff is a constitutional office, and it is very evident that it has no relation whatever to the city government so far as its duties and official obligations are concerned.

City officers, as has been said by the Court of Appeals in *Wetmore v. The Mayor*, 67 N. Y. 21, are "*such as are connected with the political organization of the city government.*"

If a person is not connected with the political organization of the city government, the mere fact that his salary is paid by the city does not make him an officer thereof.

This has been held in numerous cases by the courts, as, for instance, in the well-known case, *Fellows v. The Mayor*, 8 Hun. 484, which was an action brought by Col. John R. Fellows, at that time an assistant district-attorney, for salary, and the Supreme Court, General Term, held most emphatically that the mere fact that Col. Fellows was paid his salary by the city and county did not make him a city officer, but that he was, on the contrary, a State officer.

This has also been held in *McDonald v. The Mayor*, of which

a brief abstract is given in the nineteenth weekly digest, 513, and which was affirmed by the Court of Appeals in 102 N. Y. 728. This case was in relation to an assistant clerk of the city court.

The court held again (as appears from its manuscript opinion), that the fact that he was paid a salary by the city did not made him a city officer, he being employed in a court which was local, it is true, but which was part of the judicial system of the State. And the same ruling was made in regard to the same office some years later by Judge Barrett on May 24, 1889, in *McDonald v. The Mayor*, at Circuit of the Supreme Court, and his opinion takes the ground already stated.

And the same has been held in regard to an interpreter of a district court in the city of New York (*Goettinan v. The Mayor*, 6 Hun, 132), and as to an assistant clerk in the same court (*People ex rel. Gilchrist v. Murray*, 73 N. Y. 535.)

An examination of these and other cases by your committee, shows that the true test by which the nature of the office is to be ascertained, is not the source of payment of the salary, but the nature of the duties imposed upon the officer, and an examination of the present case shows that Mr. O'Donnell had absolutely no duties toward the city of New York, that he was employed by and rendered service exclusively to one person, the sheriff, who is a State officer under the Constitution.

For these reasons your committee do respectfully report that in their opinion the objection to the eligibility of Mr. O'Donnell is not well taken, and that he was and is entitled to his seat as member of the Assembly.

It may, perhaps, be well to say that some question was raised before this committee by Mr. O'Donnell's counsel as to whether Mr. La Maida was himself eligible to the office of member of Assembly, but that in view of the conclusion reached by your committee, this question was not considered by them in arriving at their determination.

Therefore your committee reports the following resolution and recommends its adoption by your honorable body:

Resolved, That the Honorable Thomas J. O'Donnell, the sitting member of Assembly for the eighth Assembly district of the city and county of New York, in the Assembly of this State for the year 1894, is entitled to his seat therein as such member of Assembly.

All of which is respectfully submitted.

Dated *February* 15, 1894.

GEO. S. HORTON,
EUGENE F. VACHERON,
J. F. TERRY,
HENRY McNAMEE,
VICTOR J. DOWLING,
JNO. C. HARRIGAN,

Committee.

Mr. Speaker put the question whether the House would agree to said report, and it was determined in the affirmative, a majority of all the members elected to the Assembly voting in favor thereof.

Ayes, 119. Noes, 00.

Assembly Journal, 117th session, 1894.

Case of Robert Millér and Patrick F. Trainor.

IN ASSEMBLY, *January* 2, 1894.

Mr. Lawson presented the petition of Robert Miller, contesting the seat held by Patrick F. Trainor as member of Assembly for the seventeenth district of New York county; which was referred to the committee on privileges and elections.

TUESDAY, *February 6, 1894.*

Mr. Horton offered the following:

In the matter of the contest of Robert Miller, for the seat in the Assembly of the State of New York, to which the Hon. Patrick F. Trainor was elected, and now occupies, as member of Assembly for the seventeenth district in the city of and county of New York:

To the Honorable, the Legislature of the State of New York:

Your committee on privileges and elections, to whom was referred the above-entitled matter, respectfully reports:

That Robert Miller, the contestant herein, appeared in person before your committee and stated that he had abandoned the contest in said matter mentioned; and

That said contestant thereupon declined to offer any evidence in relation to such contest;

Therefore, your committee reports the following resolution, and recommends its adoption by your honorable body:

Resolved, That the Hon. Patrick F. Trainor, the sitting member of Assembly for the seventeenth Assembly district of the city and county of New York, in the Assembly of said State for the year 1894, is entitled to his seat therein as such member of Assembly.

All of which is respectfully submitted.

Dated *February 6, 1894.*

GEORGE S. HORTON.
JAMES R. SHEFFIELD.
J. F. TERRY.
EUGENE F. VACHERON.
HENRY McNAMEE.
PHILIP KECK.
JOHN C. HARRIGAN.
VICTOR J. DOWLING.

Committee.

Mr. Speaker put the question whether the House would agree to said report and it was determined in the affirmative.

Ayes, 90. Noes, 00.

Assembly Journal, 117th session, 1894.

Case of Jules O'Brien and Cornelius Coughlin.

WEDNESDAY, *January 17, 1894.*

Mr. Wittet presented the petition of Jules O'Brien, contesting the seat now held by Cornelius Coughlin; which was referred to the committee on privileges and elections.

MONDAY, *April 9, 1894.*

Mr. Horton, from the committee on privileges and elections, presented the following report:

To the Assembly of the State of New York:

The committee on privileges and elections, to which was referred the petition of Jules O'Brien, of the first district of Erie county, State of New York, claiming that he was the duly elected member of Assembly from that district at the last general election held on the 7th day of November, 1893, and that he is entitled to the seat in this body now held by Cornelius Coughlin, respectfully report:

That the committee appointed to hear the parties and take the testimony, held their sittings in the city of Buffalo, county of Erie, at different times, according to the convenience of parties and witnesses; that both contestant and contestee appeared before the committee, and were also represented by counsel, and were present at the several sittings of the committee; that the parties to the proceedings were duly heard, and the witnesses were sworn and examined, the evidence of which is submitted herewith.

And we do further report that grave violations of the Election Law occurred in the fourth district of the first ward, and the fifth district of the nineteenth ward of the city of Buffalo, such as would warrant your committee in rejecting the entire vote of each of such

districts; that other violations of the Election Law occurred in the third district of the first ward, and the third district of the nineteenth ward, which would also warrant your committee in rejecting the entire vote of each of such districts.

In the third district of the third ward the evidence discloses a most lamentable state of affairs. Witnesses absolutely reliable and of representative character testified without contradiction to the following effect: Three deputy sheriffs were stationed in front of the ballot table with democratic paster ballots in their possession and would solicit voters to take their paster ballots and vote them. John Sheehan, the democratic candidate for alderman of the ward, was inside of the polling place and in the immediate vicinity of the ballot clerks distributing paster ballots to the voters as they came in. The deputy sheriffs, or one of them at least, would time with a watch the voters who were in the compartments, and in many instances ejected them therefrom when five minutes only had elapsed, while in other cases voters were allowed to remain in the compartments sometimes as long as fifteen minutes, thus showing evident discrimination, while those who were ejected at the end of five minutes were refused a new set of ballots and so far as the evidence discloses those still in their possession were not destroyed. Men were permitted inside of the compartments to fold ballots for voters who were not required to take the disability oath. In some instances the men who were folding the ballots, or supposed to be, would remain in there while more than one voter was adjusting his tickets. Electioneering was going on in and about the polling place all day long. One of the ballot clerks in handing the ballots to many of the persons applying therefor would turn to the democratic ticket, which was the last bunch on the table, and tell them, "This is the democratic ticket. Vote this all right." In several instances, at least, he folded the original ballots in explaining how to fold ballots and then he would straighten them again, but of course the creases were there and that ticket would be in the bunch which the voter would be permitted to use, and this despite the fact that this polling place was supplied with sample ballots

which should have been used for such purposes. The police who were in attendance, were appealed to by the republican watcher (Mr. Eddy), to stop such unlawful procedure, but no attention was paid to him throughout the entire day. The men who were most actively engaged in folding ballots for voters who did not take the disability oath were the three deputy sheriffs above referred to, and John Sheehan, the democratic candidate for alderman. There was no attention paid to the requirement of law that all ballots of the voter shall be accounted for when he cast his ballot. Very many ballots were, therefore, left in the compartment. These were gathered up by the ubiquitous Sheehan, who seemed to have been permitted to go in and out of the polling place and compartments throughout the entire day, to solicit votes for the entire democratic ticket inside of the polling place, and indeed, to violate the law without hindrance. Across the street from the polling place was located a saloon, not more than seventy-five feet distant. All day long that was used as a rendezvous for democratic voters and workers. A man would be taken in there by a worker and when they came out the worker led the man up to the polling place and directed him where to get his ballots and what to do with them. The police refused to permit a republican watcher, Mr. Mahoney, to enter the polling place for a good portion of the day, even threatening to strike him on the head with their clubs. Every safeguard which the law places around elections intending thereby to secure an honest expression of the will of the people, were violated in this district.

In the fourth district of the first ward, so open, flagrant and disgraceful were the violations of the election laws, in which even the uniformed police officers participated, that the counsel for the contestee on the trial and in his argument admitted that the vote for this district should be rejected, and your committee think he was right.

The evidence of Mr. Willis M. Spaulding regarding the third district of the nineteenth ward is equally interesting. Mr. Spauld-

ing, who is a reputable lawyer, engaged in the practice of his profession and a resident of the city of Buffalo, was a watcher in this district, and in fact was the only watcher inside of the polling place for either the prohibition or republican parties. His colleague, Mr. Bidwell, was refused admittance inside of the polling place. Voters whose ballots were folded incorrectly were refused another set in some instances. Electioneering in and around the polling place was permitted throughout the entire day. The chairman of the board of inspectors would refold the ballots of voters presented to him improperly folded. The majority of the men who were assisted in folding their ballots inside of the compartments were not required to take the disability oath. The democratic watchers and one member of the board of inspectors went into the compartments with the voters, and although Mr. Spaulding objected to it, no attention was paid to his objection. This evidence is not contradicted. It is indeed true. A witness who claimed to be a republican member of the board of inspectors and was appointed as such was sworn upon the hearing. His evidence, however, shows that electioneering was carried on within the polling place, although he claims upon his objection it would cease. It also shows that when he would look around at the compartments he would see two or three men in a compartment, and would rush and try to pull them out. To our minds, such a condition of affairs where voters would be permitted to crowd into the polling place in sufficient numbers to get two or three men into a compartment at various times throughout the day shows a most reprehensible lack of care on the part of the police and of the board of inspectors, and inclines us to the belief that the evidence of Mr. Spaulding is absolutely true.

The evidence with regard to the fifth district of the nineteenth ward is also uncontradicted. Throughout the entire day electioneering went on in and around the polling place; the ballots of voters handed to the inspector for deposit were examined by him and the vote the inspector desired would be deposited in the box

and the presumption is fair that the ballots intended to be voted would find their way into the waste box, and although the conduct of the election in this district was so barefaced and unlawful that counsel for the contestee did not make an attempt to uphold it and practically conceded that the vote should be rejected.

In our judgment the law with reference to the one hundred and fifty foot limit is a good and wise law. It was made to be observed and for a good purpose. Robert Ross, of Troy, whose murder thrilled the country, is a victim to the violation of this statute, and when the evidence discloses, as it does, that members of the democratic party openly violated the law in this regard, as well as in many others, your committee feel justified in reaching the conclusion that the vote in all these districts heretofore mentioned should be thrown out and the inspectors' returns rejected.

In conclusion your committee desires to state, that the action of the police and of the sheriff and his deputies at the last election in this Assembly district points conclusively to the existence of a conspiracy on the part of the authorities in Erie county to thwart the will of the people. We have the right to recall and take judicial notice of the fact that on the night of the last day of the session of 1893 a law was passed which placed the management of the police force of the city of Buffalo in the hands of the democratic managers. The evidence discloses why such management was desired. The conduct of the police was outrageous. In many instances individual voters were assaulted and seriously injured by the deputy sheriffs while inside of the polling places in the fourth district of the first ward. One James Kennedy, a well known democratic worker, stood directing the conduct of the inspectors of election, although not a member of the board, ordering the ejection of watchers, electioneering within the polling place, showing voters into compartments where men had previously been placed to fix the ballots, and when a warrant for his arrest was placed in the hands of the sheriff of Erie county it was not executed, although Kennedy remained in the polling place throughout the entire day and until the ballots were counted.

The total majority for Cornelius Coughlin was proven to be one thousand six hundred and ninety-five, and if the entire vote of these districts heretofore mentioned be rejected on account of the worthlessness of the returns, the contestee, Mr. Coughlin, would still have a plurality over the contestant. Your committee, therefore, find, and do report, that upon all the proceedings taken, the contestee and sitting member, Cornelius Coughlin, is entitled to the seat now held by him as member of Assembly for the first district of Erie county, and do recommend the adoption of the following resolution:

Resolved, That Cornelius Coughlin is entitled to hold the seat now occupied by him in the Assembly of the State of New York as the representative from the first district of Erie county.

All of which is respectfully submitted.

GEO. S. HORTON.

EUGENE F. VACHERON.

J. F. TERRY.

C. WESLEY GOULD.

JAMES R. SHEFFIELD.

PHILIP KECK.

Dated *April 9*, 1894.

Mr. Speaker put the question whether the House would agree to said report, and it was determined in the affirmative.

Ayes 113. Noes 00.

Assembly Journal, 117th session, 1894.

Case of Henry B. Page and Michael F. Tobin.

IN ASSEMBLY, TUESDAY, *January 2*, 1894.

Mr. Lawson presented the petition of Henry B. Page, contesting the seat held by Michael F. Tobin, as member of Assembly for the twenty-second district of New York county; which was referred to the committee on privileges and elections.

TUESDAY, *February 6, 1894.*

Mr. Horton offered the following:

In the matter of the contest of Henry B. Page for the seat in the Assembly of the State of New York, to which the Hon. Michael F. Tobin was elected and now occupies as member of Assembly for the twenty-second Assembly district, in the city and county of New York.

To the Honorable, the Assembly of the State of New York:

Your committee on privileges and elections, to whom was referred the above entitled matter, respectfully reports:

That Henry B. Page, the contestant herein, duly appeared before your committee and withdrew his contest set forth in said matter, and declined to offer any evidence in relation thereto.

Therefore, your committee reports the following resolution and advises its adoption by your honorable body:

Resolved, That the Hon. Michael F. Tobin, the sitting member of Assembly for the twenty-second Assembly district of the city and county of New York, in the Assembly of said State, for the year 1894, is entitled to his seat therein as such member of Assembly.

All of which is respectfully submitted.

Dated *February 6, 1894.*

GEO. S. HORTON,
JAMES R. SHEFFIELD,
EUGENE F. VACHERON,
VICTOR J. DOWLING,
HENRY McNAMEE,
JNO. C. HARRIGAN,
J. F. TERRY,
PHILIP KECK,

Committee.

Mr. Speaker put the question whether the House would agree to said report, and it was determined in the affirmative.

Ayes 90. Noes 00.

Assembly Journal, 117th session, 1894.

Case of George R. Pasfield and William E. Melody.

IN ASSEMBLY, TUESDAY, *January 2, 1894.*

Mr. Taylor presented the petition of George R. Pasfield, contesting the seat now held by Wm. E. Melody as member of Assembly for the ninth district of Kings county; which was referred to the committee on privileges and elections.

FRIDAY, *April 20, 1894.*

Mr. Keck, from the committee on privileges and elections, presented the following report:

To the Honorable Assembly of the State of New York:

Your committee on privileges and elections present the following report in the matter of the contest for a seat in this Assembly, from the ninth district of Kings county, between George R. Pasfield, contestant, and William E. Melody, contestee.

Your committee, after organization, appointed Messrs. Keck, chairman, Wesley Gould and John Harrigan a subcommittee to make the investigations herein. Said subcommittee attended the hearings from time to time in the city of Brooklyn, both parties hereto appearing in person and by counsel, and heard the evidence presented by both parties, which evidence is on file and to which the committee here make reference.

George E. Elliott, Esq., attorney-at-law, appeared for the contestant, and Messrs. Judge and Durack, attorneys-at-law, appeared for the contestee.

After carefully considering the evidence offered by the respective parties, from which it appears that the election laws were violated in some respects, but not to such an extent as to warrant your committee in acting upon said petition favorably to the contestant; your committee, therefore recommend that the petition of the contestant be dismissed, and that William

E. Melody be declared to be the regular representative in and for the ninth Assembly district of the county of Kings, and entitled to his seat as such in this body.

All of which is respectfully submitted.

PHILIP KECK.
E. F. VACHERON.
JAMES R. SHEFFIELD.
J. F. TERRY.
JNO. C. HARRIGAN.
VICTOR J. DOWLING.
HENRY McNAMEE.
WESLEY GOULD.

Mr. Speaker put the question whether the House would agree to said report, and it was determined in the affirmative.

Ayes, 85. Noes, 00.

Assembly Journal, 117th session, 1894.

Case of Seth Wilks and Adolph Schillinger.

IN ASSEMBLY, TUESDAY, *January 2, 1894.*

Mr. Lawson presented the petition of Seth Wilks, contesting the seat held by Adolph Schillinger as member of Assembly for the fifteenth district of New York county; which was referred to the committee on privileges and elections.

FRIDAY, *April 6, 1894.*

Mr. Horton, from the committee on privileges and elections, presented the following report:

In the matter of the contest by Seth Wilks of the seat of Adolph Schillinger of the fifteenth Assembly district of New York.

To the Honorable Assembly of the State of New York:

The committee on privileges and elections, to whom was referred the matter of the contest above-mentioned, respectfully report:

That at the county court house in the city of New York, upon notice to Adolph Schillinger, the contestee, and Seth Wilks, the contestant, testimony was taken and proceedings duly had • herein. Mr. Schillinger appeared by John J. De Lany and Hon. Edward Brown, of counsel, and Mr. Wilks by Messrs. Groo and Thornton.

The grounds upon which Mr. Wilks contested the seat, as set forth in his protest to your honorable Assembly, dated January 2, 1894, were gross violation of the election laws, intimidation of voters and gross frauds alleged to have been perpetrated in the fifteenth Assembly district of New York. During the inquiry these charges were narrowed down to specific allegations, and by the general consent of the committee and by acquiescence of counsel on both sides, the issue was confined to these two allegations, which are:

First. That on the day of election Adolph Schillinger, the sitting member of Assembly, attempted to bribe one Hurtell, a blind man, to vote for him.

Second. That in violation of law, Adolph Schillinger was, on said election day, electioneering within one hundred and fifty feet of the polls.

After carefully examining the testimony presented in support of and in opposition to these last-mentioned charges, your committee is of opinion that the allegations have not been proven, and accordingly finds against the contestant, and that Adolph Schillinger was duly elected member of Assembly for the fifteenth New York district.

Therefore, your committee reports the following resolution, and recommends its adoption by your honorable body:

Resolved, That Adolph Schillinger was elected member of

Assembly for the fifteenth Assembly district for the county of New York, at the election therein, held November 7, 1893, and is entitled to his seat in the Assembly of the State of New York, now held by him therein.

Dated *April 5*, 1894.

All of which is respectfully submitted.

GEO. S. HORTON.

EUGENE F. VACHERON.

PHILIP KECK.

WESLEY GOULD.

J. F. TERRY.

HENRY McNAMEE.

JNO. C. HARRIGAN.

VICTOR J. DOWLING.

Mr. Speaker put the question whether the House would agree to said report, and it was determined in the affirmative.

Ayes, 95. Noes, 00.

Assembly Journal, 117th session, 1894.

Case of Amos J. Ablett and Curtis N. Douglas.

IN ASSEMBLY, TUESDAY, *January 2*, 1894.

Mr. J. F. Terry presented the petition of Amos J. Ablett, contesting the seat occupied by Curtis N. Douglas as member of Assembly for the fourth district of Albany county; which was referred to the committee on privileges and elections.

FRIDAY, *April 6*, 1894.

Mr. Horton, from the committee on privileges and elections, presented a report on the matter of the petition of Amos J. Ablett, claiming the seat now occupied by Curtis N. Douglas, representing the fourth district of Albany county; which was laid upon the table and ordered printed.

MAJORITY REPORT OF THE COMMITTEE ON PRIVILEGES AND ELECTIONS, RELATIVE TO THE PETITION OF AMOS J. ABLETT, CLAIMING THE SEAT NOW OCCUPIED BY CURTIS N. DOUGLAS, REPRESENTING THE FOURTH ASSEMBLY DISTRICT OF ALBANY COUNTY.

To the Honorable, the Legislature of the State of New York:

The committee on privileges and elections, to which was referred the petition of Amos J. Ablett, claiming the seat now occupied by Curtis N. Douglas, as member from the fourth Assembly district of the county of New York, respectfully report:

That they have heard the proofs and allegations of the respective parties, parties, and the arguments of counsel, and the facts of the case as found by us are as follows:

The whole number of votes cast in this Assembly district was nine thousand eight hundred and ninety-six, of which number

Curtis N. Douglas received	4,874
Amos J. Ablett received	4,603
William R. Gaffers received	191
Frank Coufal received	124
Blank	105
Total	<u>9,896</u>

As declared by the board of county canvassers.

That the fourth Assembly district of Albany county consists of the territory embraced within the city of Cohoes, the town of Watervliet and the third and fourth election districts of the ninth ward of the city of Albany.

That the questions raised before us involved the examination of the fourth, sixth, ninth, thirteenth and seventeenth election districts of the town of Watervliet.

That by the official canvass it appears that the whole number

of votes cast in the thirteenth election district of the town of Watervliet, was two hundred and forty-five, of which

Curtis N. Douglas received	232
Amos J. Ablett received	13
Total	<u>245</u>

That a majority of the board of inspectors were democrats; that there was only one ballot clerk in the district, a democrat.

The election in this district was conducted in a shameful disregard of law; in fact, the forms of law seem to have been unknown.

Soon after dinner repeating commenced and was permitted and encouraged by the democratic members of the board of inspectors and their partisans, notwithstanding the protest of the republican members of the board and their friends.

Mr. Henry Heinmiller, the republican inspector, testified that there were a great many men voted more than once; he gave a detailed description of four or five of them. One of these repeaters voted nine times, each time being challenged by Mr. Heinmiller, but he swore in his vote each time. This witness also gave a clear description of four other repeaters who voted three or four times each, to his knowledge. These repeaters were also challenged each time and swore in their vote.

Mr. Hiram Frost testified that he saw four repeaters vote seven times each, being challenged each time, and swore in their vote. These two witnesses testified that Thomas Scully, the democratic chairman of the board, repeatedly went into the booths with these repeaters, and when Scully did not accompany them into booths, other democratic workers did so.

William Volk and Ellsbury Cobee also testified substantially as Heinmiller and Frost.

About the time these repeaters were voting, Mr. Henry Smith, one of the oldest electors of the district, came to vote. He is seventy-eight years old and nearly blind. He wanted to vote

the republican ticket. Scully, the democratic chairman of the board, who was then manipulating this gang of repeaters, took the old man in the booth and folded his ticket, and gave him a democratic ticket to vote saying that it was a straight republican ticket; while in the booth Smith asked this man Scully his name, and Scully said his name was Riley. This deceit perpetrated upon this old gentleman illustrates to some extent the personal interest and participation Scully took in the fraud committed in this election district.

Frederick Gearing was not registered, and of course had no right to vote, but, however, this liberal democratic board allowed him to vote. When produced by contestant, Gearing testified that he voted for Curtis N. Douglas.

The evidence shows that when the electors came to vote they were each required to give street and number of their residence, which was put upon the poll list.

The poll list shows seventeen persons as voting from Foster avenue, a short avenue with but a few houses on it. The contestant produced every householder on this avenue, who testified to each voter residing with him, and only one, William Green, of the seventeen can be found. Your committee find that there were sixteen fraudulent votes cast from Foster avenue alone.

The poll list also shows thirty-eight persons as voting from Corning street. The contestant also produced every householder on that street, who testified to the number of voters residing with him, but of the thirty-eight only fifteen could be found. Your committee finds that there were twenty-three fraudulent votes cast from Corning street alone.

The evidence shows that there were two hundred and forty-five sets of ballots delivered to the electors and voters, but when the polls were closed and the ballots counted there were two hundred and eighty-one ballots in the box.

When the canvass commenced, the inspectors, without first counting the ballots, opened and assorted them and made separate piles of the democratic and republican tickets, then counted the

ballots and found that there were thirty-six ballots too many in the box. While opening and assorting the ballots it was a frequent occurrence to find two ballots folded together. In each and every instance there was found to be one straight democratic ticket, and one of the other tickets with a straight democratic paster on, folded together, thus fully explaining and showing conclusively where the thirty-six extra ballots came from and to whom this fraud must be charged.

After opening and assorting the democratic and republican ballots and ascertaining that there were thirty-six extra ballots in the box, the democratic chairman of the board, who repeatedly accompanied repeaters into the booths, who allowed one man to vote nine times and four men seven times each, who cheated the man that was nearly blind and 78 years old out of his vote, put all the democratic ballots in the bottom of the box and then placed the republican ballots on top and went through the form of shaking the box, but the evidence clearly shows that the box was so full, the ballots being then opened, that no amount of shaking could mix the ballots, drew thirty-four republican tickets out and only drew two democratic tickets.

Your committee hold that, inasmuch as it must be conceded that there were at least fifty-one republican ballots among the two hundred and eighty-one ballots in the box, that it would be impossible for an honest election official in an honest way to draw just two democratic ballots and thirty-four republican ballots from the box, and that none but a dishonest inspector who intentionally perpetrated such fraud, could perform such a miracle.

The evidence satisfactorily shows that Amos J. Ablett received fifty-one votes instead of thirteen with which he is credited on the returns.

The unusual method adopted in this case of each inspector taking a portion of the ballots and announcing the result of his own count, one inspector not examining or counting the ballots of his fellow inspectors, affords the fullest opportunity for fraud.

Notwithstanding the positive evidence as to the fraud in this

district, for some reason not explained the contestant omitted to produce any evidence in contradiction or to explain this wholesale fraud.

That the sitting member attempted to prove the vote he received in this district by calling electors. Out of the two hundred and thirty-two votes with which he is credited he was able to establish about one hundred and twelve votes, and it was developed upon cross-examination of these witnesses that about fifty per cent. of them were accompanied into the booth by the chairman of the board and by John Mallon and Patrick Horan, two democratic workers, without any oath of disability being taken, and the fact is only one voter was unable to fold his tickets.

That the election in this district was conducted by the inspectors in shameful disregard of law, fraud being the rule and not the exception, the democratic inspectors manifesting a contempt for law and decency seldom paralleled in the annals of the election crime.

For the reasons heretofore stated, we think the returns of the inspectors should be entirely rejected, and upon that hypothesis, the result in that district would be as follows:

Douglas received	112
Ablett received	51
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	61
	<hr/>

This would reduce Mr. Douglas' nominal majority of 272 down to 114.

SEVENTEENTH DISTRICT.

The whole number of votes given for the office of member of Assembly in the seventeenth election district of the town of Watervliet was three hundred and fifty-eight, of which

Curtis N. Douglas received.....	259
Amos J. Ablett received.....	97
William R. Gaffers received.....	1
Frank Coufal received.....	1
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	358
	<hr/>

The democrats had a majority of the board of inspectors in this district also.

There were no republican poll or ballot clerks appointed in this district until about 10 A. M.

That fraud was premeditated by the inspectors is clearly deducible from the uncontested facts of the case.

There are two hundred and thirty-nine alleged electors registered from the "Troy road," but of this number, after swearing every householder on said road, there are ninety-three of the two hundred and thirty-nine names that do not reside on said road and cannot be found, and of the ninety-three fictitious names forty-seven of them are on the poll list as having voted; twenty-nine of this forty-seven are down as voting within twenty minutes after the polls were opened.

The following is a list of the names that appear upon the poll list as having voted, but their names are not upon the register book, and, of course, they are not entitled to vote:

G. H. Burchell voted ballot No. 342.

Henry Bellis voted ballot No. 344.

Martin Casey voted ballot No. 55.

A. B. Clark voted ballot No. 66.

L. Capron voted ballot No. 357.

James Drew voted ballot No. 72.

William Hemus voted ballot No. 354.

Thomas Keenan voted ballot No. 293.

Patrick Murray voted ballot No. 84.

John McLean voted ballot No. 89.

John McLean voted ballot No. 90.

John Mullins voted ballot No. 261.

John Mullins voted ballot No. 130.

G. W. McCleary voted ballot No. 272.

Floyd Mann voted ballot No. 324.

Samuel McCall voted ballot No. 325.

Edward Noxon voted ballot No. 92.

John Nolan voted ballot No. 212.

W. Neville voted ballot No. 255.

Louis Seabest voted ballot No. 77.

Joseph Snapp voted ballot No. 196.

Edward Walsh voted ballot No. 275.

The following names are on the registry book once, but their names are voted on twice each:

John Donohue voted ballots Nos. 15 and 300.

W. G. Palmer voted ballot Nos. 64 and 285.

Michael Callahan voted ballot Nos. 13 and 313.

No explanation was given why the inspectors allowed these twenty-five men to vote, and of course, unexplained, shows the grossest kind of fraud and contempt for law on the part of the inspectors.

The poll list reports the following as having voted, but the evidence shows that repeaters personated these men and voted upon their names:

Names.	Page.
C. F. Francis.....	1152
Moses File	1165
James Blake	1174
Michael Lonans	1177
Lawrence Christie	1202
John James	1213
Edward Sanders	1219
John McLean	1222 and 1249
John McLean	1223
Robert McCoy	1236
Michael McBoyle	1385
Martin C. Tidd.....	1443
Robert Clark	1575
William J. Cunningham.....	1579
John J. Cunningham.....	1583
William H. Vanderbergh.....	1588

Name.	Page.
John McCully	1591
Daniel Elder	1594
John Rupp	1596
Stephen Delaney	1664
Horace Green	1668
David Gunsalus	1679
John Cullen	1735
John Burns	1976

Twenty-four names.

Romain Walker is a registered voter, and went to vote, but the inspectors would not permit him to vote.

Within less than twenty minutes after the polls opened Mr. Frank W. Joslin, editorial writer for the Troy Times, voted ballot No. 96. He testified that there was only one other man there except the inspectors at that time. This would be equal to voting five a minute, a state of affairs very improbable for this exceedingly rural district, and it is impossible to resist the conclusion, which impresses itself upon us that the inspectors and not the electors voted most all of the first one hundred ballots.

Theodore F. Allsheskey received the appointment as republican inspector, and took the oath of office, which he gave to William Poelk to file with the town clerk. Mr. Poelk, while going to file said oath of office, met the town clerk on the street and gave him the same, which the clerk agreed to file, but omitted to do so, and the democratic town board appointed Robert Walker, an alleged republican, to act as inspector. On the first day of registration, Mr. Allsheskey (not knowing that another had been appointed in his place) went to act as one of the board of inspectors, but the democratic members refused to allow him to so act. This illustrates the premeditated scheme to commit fraud in this district, which was so effectually carried out on election day.

With the above fraud, which the contestant has made no attempt to explain or contradict, we must disregard the returns from this district and give only such votes as have been proven.

The evidence shows sixty-three votes cast for Amos J. Ablett. This makes Mr. Ablett's majority forty-eight, and then credit him with the sixty-three votes he proved in this district makes Mr. Ablett's majority one hundred and eleven.

That by the official canvass it appears that the whole number of votes cast in the fourth election district of the town of Watervliet was three hundred and eighty-three, of which

Curtis N. Douglas received.....	221
Amos J. Ablett received.....	142
William R. Gaffers received.....	14
Frank Coufal received.....	6
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	383
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This district seems to have been a fruitful field for repeaters. The evidence of fraud is not only conclusive, but uncontradicted.

Your committee finds that there were cast for Curtis N. Douglas fifty-one fraudulent votes. The names of absentees from the district, village and State, those who were sick and therefore unable to leave their homes on election day were used for this purpose. No testimony was offered by the sitting member to explain away the force of this serious charge.

The following is the list of names upon which the fraudulent votes were cast, and the page where the testimony proving the same will be found, to wit:

Names.	Page.
Edward Wolford	891
George S. Loucks.....	894
John Fitzgeralds	899
Lincoln Flannigan	901
Joseph Cady	904
George T. Davis.....	912

746 CASES OF CONTESTED ELECTIONS TO SEATS IN THE

Name.	Page.
Michael Cassily	914
John B. Gardner.....	916, 942
Louis Jarvis	920
Jeremiah Curtin	925
Thomas Maloney	1023
William HOFFMAN	1030
William H. Jackson.....	1033
James Nevvins	1037
Otto Fischer	1040
Louis Jefferson	1042
William Judge	1044, 1150
Thomas E. Walsh.....	1150
William Perry, Jr.....	933
Louis Neibuhr	938
William Edwards, Jr.....	940
William Langdon	941
H. E. Burton.....	945
William Heighmay	946
Henry Horton	947
John McNierney	951
Matthew Murphy	953
John Mullen	967
Edward McGuire	1133
John Curtin	1134
Patrick Owens	1135
Gustave Page	1137
F. A. Walsh	1137
John Leonard	1179
Daniel Cavanaugh	1188
John Corbet	1191
Gideon Russell	1282
F. A. Valley	1283
Frank Rogers	1284

Name.	Page.
Thomas Fox	1018
John Rosenbergher	1395
John Drake	1399
Thomas Drake	1400
William Pardee	1402
William Oliver	1403
F. R. Fuller	1670
Henry Bancroft	903, 939
Henry Rice	901, 918
George Teal	1285
Frank Gillies	1200
Lawrence Early	928

After the real William Bancroft voted a repeater came and swore that he was Bancroft and he was also allowed to vote.

When the real George Teal and Henry Rice went to the polling booth to vote they discovered that repeaters had voted upon their names, but the inspectors allowed them to vote also.

Lawrence Early was allowed to vote without being registered, and when produced as witness he testified that he voted for Douglas.

The evidence shows that Barrigan, the democratic ballot clerk, and Augustus Neibuhr were accompanying repeaters into the booths frequently all day; that Barrigan and Neibuhr would repeatedly simply take repeaters to one side and fold their tickets on a coal box or shelf situated in one corner of the room, and bring the repeaters to vote without going into the booth at all.

It also appears that when the repeaters came in they handed Barrigan, the democratic ballot clerk, a slip of paper from which Barrigan would call out their names. These repeaters were all challenged and swore in their votes. The democratic chairman of the board, in administering the oath to the repeaters, would

say, "You swear your name is John Doe; you reside at such a number on such a street?" The repeater would simply answer "yes" and his vote was taken.

When the ballots were canvassed it was discovered that there were three double ballots folded together, each, containing one straight democratic ballot, and the other containing a straight democratic paster-ballot.

Mr. Harry Holsapple, the republican inspector in this election district, refused and has never signed the returns.

The evidence shows that twenty-three per cent. of the votes received by Mr. Douglas in this district were fraudulent.

Under such a state of facts it seems clear to us that the returns of the inspectors of election in this district should be rejected, and neither party having proved any votes in this district, none should be allowed. Mr. Douglas will, therefore, lose two hundred and twenty-one votes, and Mr. Ablett will lose 142, thus making Mr. Ablett's majority one hundred and ninety.

In recommending the rejection of the returns of the inspectors of election in the fourth, thirteenth and seventeenth election districts of the town of Watervliet, we are following the precedents of legislative bodies and of the courts.

While full faith and credit is to be given to the inspectors' returns, it must be remembered that "in this country it is the actual expressed will of the electors, not the certificate of inspectors, that confers the title to the office." *The People v. Thatcher*, 7 Lans. 274. "And where the veracity of the certificate is attacked the best evidence is that of the electors themselves." 7 Lans. *supra*, 272.

The Court of Appeals in the Thatcher cases, 55 N. Y. 525, establishes the doctrine that if the returns are known to be false or uncertain or unreliable, they are to be rejected, and each claimant can only be allowed such votes as the evidence in the case shows that he received.

The House of Representatives, in the contest of Frisbee, Jr.

v. Finley, second district of Florida (2 Ellsworth House Election cases, 172), settles the law for that body when it decided:

“Where the evidence shows the returns to be false, and not a true statement of the votes cast, such return is impeached and destroyed as evidence, and the true vote may be proven by calling electors whose names are on the poll list as voting at such election, and no votes not otherwise proven, should be counted.” See also the case of *Sloan v. Rawbs*; *Smith Election cases*, 144; *Washburn v. Vorhies*, 2 Bart. 54.

The great American authority on elections lays down the rule that when election board of inspectors are proven to have willfully and deliberately committed a fraud, even though it affect a number of votes too small to change the result, it is sufficient to destroy all confidence in their official acts, and puts the party claiming anything under the election conducted by them to prove his votes by evidence other than the returns. (*McCreary on Elections*, 3d ed., pp. 539-941.)

In the case of *Morey v. Spencer* (4 Congressional Election Cases, 447), the committee held that fraud vitiates everything into which it enters, and that it is just impossible to determine how far the fraud effected the election as to separate the pure from the poisonous drops if poison be dropped into water.

In *Knox v. Blair* (2 Congressional Election Cases, 526), it was held:

“When the result in any precinct has been shown to be so tainted with fraud that the truth cannot be deducted therefrom, it should never be permitted to form a part of the canvass, and the precedent as well as the evident requirements of the truth, not only sanctions but calls for the rejection of the entire poll list when stamped with the characteristics here shown.” In *Brisbie v. Finley* (6 Congressional Election Cases, 187), it was held that “Any considerable number of votes proven for a candidate in excess of the number returned for him has always been regarded as an evidence of fraud, and a legislative method of impeaching the returns.”

McCreary on Elections (3d ed., 320), says: "Where it was clearly shown that the contestant received one hundred and seventy votes and the returns only gave him one hundred and forty-three (twenty-seven less than given), and there was other evidence tending to show actual tampering with the ballot-box, the return was set aside."

McCreary on Elections (3d ed., page 362), says: "If an officer of the election is detected in a willful and deliberate fraud upon the ballot-box the better opinion is that this will destroy the integrity of all his official acts, even though the fraud discovered is not sufficient to affect the result." The reason of this rule is that an officer who betrays his trust in one instance is shown to be capable of the infamy of disfranchising an elector, and his certificate is, therefore, good for nothing.

SIXTH DISTRICT.

In the sixth district of the town of Watervliet the evidence shows that repeaters voted for Mr. Douglas upon the following names: J. H. Barrett, Michael Messett, George O'Sullivan, Joseph Asher, Frank Guerin, Daniel Meehan, Joseph Duffy, William Powell, Edward Brandt, Robert Powell, Timothy Stanford, James Baldwin, Howard Bradley, ——— Pertell, Fred. Corrigan.

These repeaters were accompanied by democratic workers. (See testimony of Lawrence D. C. Woodard.) This would make Mr. Ablett's majority two hundred and five.

In the ninth election district of the town of Watervliet, the evidence shows, Peter McCarty, a democrat, came to the board of inspectors and registered twenty fraudulent names as men living with him. That six or seven repeaters voted more than once. One repeater voted four times. He was challenged each time and swore in his vote.

That the repeaters voted for Mr. Douglas upon the following names: George Sullivan, Patrick Melia, James A. Crawford,

Frank Casey, Charles Patterson, W. M. Smith, William Kehoe, Arthur Marshall, John Neilson, Simon P. Reynolds, Frank Coleman, Robert White, David Frink. (See testimony of James Pierce.)

This makes Mr. Ablett's actual majority 218.

Your committee therefore find and report that the said Amos J. Ablett was duly elected member of Assembly from the fourth Assembly district of the county of Albany and should have received the certificate of election instead of Curtis N. Douglas, and recommend the adoption of the following resolution:

Resolved, That Amos J. Ablett was, at the last general election, duly elected to the Assembly from the fourth Assembly district of the county of Albany, which seat is now held by Curtis N. Douglas, and that the said Amos J. Ablett is hereby awarded the same.

All of which is respectfully submitted.

DATED, April 5, 1894.

GEO. S. HORTON.

EUGENE F. VACHERON.

PHILIP KECK.

WESLEY GOULD.

J. F. TERRY.

JAMES R. SHEFFIELD.

MINORITY REPORT OF THE COMMITTEE ON PRIVILEGES AND ELECTIONS, ON THE PETITION OF AMOS J. ABLETT, CLAIMING THE SEAT NOW OCCUPIED BY CURTIS N. DOUGLAS, FROM THE FOURTH ASSEMBLY DISTRICT OF ALBANY COUNTY.

To the Honorable, the Legislature of the State of New York:

The undersigned, being the minority of your committee on privileges and elections, present the following report in the matter of the contest for a seat in this Assembly from the fourth district of Albany county, between Amos J. Ablett, contestant, and Curtis N. Douglas, contestee:

The matter under consideration has received much attention on the part of the committee. Nearly 3,000 pages of typewritten

testimony and the evidence of nearly 500 witnesses contained therein, is the record of the work of the committee in this contest.

The district is composed of the town of Watervliet and the city of Cohoes, in the county of Albany, besides which there are two election districts in the ninth ward of the city of Albany. There are fifteen election districts in the city of Cohoes, eighteen in the town of Watervliet, and two in the city of Albany, making a total of thirty-five election districts in the Assembly district under consideration.

The total vote polled, as appears by the official election returns for member of Assembly, was 9,896, of which Curtis N. Douglas received 4,874, Amos J. Ablett received 4,602, William R. Gaffers 191, Frank Coufal 124, and blank 105.

To summarize, as appears from the returns:

Curtis N. Douglas	4,874
Amos J. Ablett	4,602
	<hr/>
Plurality for Douglas	272
	<hr/>

Claim was made by the contestant and the proof offered on his behalf was, as to alleged irregularities in several districts of the town of Watervliet, namely: Fourth, sixth, eighth, ninth, thirteenth and seventeenth.

The proof offered as to each of these districts was somewhat similar in character and consisted generally in showing that illegal votes had been cast in each of these districts. The proof being, that fraudulent votes were cast by persons assuming names, on the registry list, and thus falsely personating the electors, fraudulently voted upon those names. The contestant had evidently caused to be made in the district thus assailed a thorough and complete canvass, so that the committee may fairly assume that the illegal and fraudulent votes proven in each of these districts represent completely such irregularity and fraudulent vote.

In many instances he has proven by republican workers at the polls that repeaters voted upon the names given of duly-qualified voters. In many of the instances he also called these voters themselves to prove that they had not themselves voted, thus doubly proving the same fact, but not doubling the number of fraudulent and illegal votes proven.

The total number of illegal and fraudulent votes thus proven in each of the election districts above referred to are as follows:

Fourth district	36
Sixth district	15
Eighth district	4
Ninth district	17
Thirteenth district	23
Seventeenth district	20
	<hr/>
	115
	<hr/> <hr/>

In some of these districts the contestant has endeavored to show a few additional votes, but from a careful examination of the testimony and the registers and the poll lists in these several districts, the above are all that can be said to have been proven. If these were all to be deducted from the plurality in favor of the contestee, it will be seen that he would still have a plurality in the Assembly district of one hundred and fifty-seven (115 from 272).

Another feature, however, is to be considered in disposing of this matter, and this relates to the thirteenth election district in the town of Watervliet. The returns from this election district show as follows:

Vote for Douglas	232
Vote for Ablett	13
	<hr/>
	219
	<hr/> <hr/>

The proof shows that after the polls were closed and the canvass was begun in this election district, the poll list called for two hundred and forty-five ballots, but that the ballots in the box overran thirty-six. The ballots had been opened, and thus opened, were returned face down in the ballot-box; one witness testifying that the republican ballots having been placed on top. Thereupon the chairman of the board of inspectors, turning his back to the ballot-box, so that he could not see, withdrew from the ballot-box thirty-six ballots, of which thirty-four were for the republican candidate. It is asserted that this was improperly done, and that thereby these votes were improperly lost to Mr. Ablett.

However this may have been done, or for what purpose, need not now be considered, in this view of the matter, for the reason that if these withdrawn ballots be credited to Mr. Ablett or withdrawn from the vote of Mr. Douglas, upon the basis above stated, the following would be the result:

Douglas' plurality, as above stated, having deducted every illegal vote proven in the whole Assembly district:	
Plurality for Douglas, by returns.....	272
Deduct every proven illegal vote in the district.....	115
	<hr/>
	157
Deduct also ballots improperly withdrawn in the thirteenth Assembly district	34
	<hr/>
Plurality for Douglas still remains of.....	123
	<hr/> <hr/>

Whereupon, all the testimony given, the committee is enabled to ascertain the vote of the electors of the district, it would be their first duty to correct the returns in accordance with such ascertained vote, and to declare the result occurring, because the electors of the several districts ought not to be disfranchised. (People ex rel. Judson v. Thatcher, 55 N. Y. 523; McCrary on Elections, pp. 480, 483, 538; Paine on Elections, p. 762.) There-

fore, assuming that every fraudulent and illegal proven vote cast in the Assembly district be deducted from the vote returned for Mr. Douglas, and the proven vote for Mr. Ablett in excess of that returned for him by the inspectors in the thirteenth district be further deducted from this, it will be seen that a plurality still remains for Mr. Douglas, and he is entitled to his seat.

Upon another aspect of this case, the result would be the same. It is claimed by the contestant that the returns in several of the election districts should be disregarded.

It is well settled by many authorities (I), that irregularities by inspectors do not invalidate the vote of their district unless they change the result. *People ex rel. Bradshaw v. Bidelman*, 69 Hun, 596, is a recent case reiterating this well-known doctrine and cites standard authorities.

"The power to reject an entire poll is certainly a dangerous power, and should be exercised only in an extreme case, where it is impossible to ascertain with reasonable certainty the true result." (*McCrary on Elections*, pp. 488, 489.) Elections are to be determined by the majority of votes. A decision which will defeat the will of the majority will subvert the foundation principle of republican government. (See opinion of Andrews, J., in *People ex rel. Nichols v. Board of Canvassers*, 129 N. Y. 433.)

The election districts assailed by the contestant in each instance, are such where the democratic vote largely predominates, and it is obvious that unless the returns from one or more of these heavy democratic districts be disregarded the actual votes show a plurality for the contestee.

The contestant asks that the returns in several districts be disregarded. Some of the more important and serious grounds will be considered. Among other grounds, upon which contestant asks that these returns be disregarded, is the one that illegal votes were permitted to be cast.

It affirmatively appears that in each instance where a per-

son offering to vote was challenged the oath was administered by the inspector, and after the oath was taken the ballot was received and deposited.

From this fact alone it is not safe to predicate fraud or illegal conduct on the part of the inspectors.

The Court of Appeals has laid down the rule in express terms: "The inspector is only a ministerial officer, and if the oath be taken it is the absolute duty of the inspectors to receive the vote." (*People v. Bell*, 119 N. Y. 175; *People v. Board of Canvassers*, 129 N. Y. 372.)

The election code published for the inspectors lays down the law that it is the duty of the inspectors to accept the vote if the oath be taken. (Election Code, p. 62; Manual for Inspectors, p. 67.)

It was proven in behalf of contestant that upon the challenges to proposed voters the inspectors in several districts said that if the person challenged took the oath they were bound to receive it. Thus it will be seen they were justified in view of the law as laid down and above referred to.

It is doubtless true, that, in some of these districts, occurrences to be severely criticized took place such as in one district (seventeenth) there were no doors upon the booths.

In several of the districts referred to (notably the thirteenth) there seemed to have been an utter disregard of the provisions of law which required the voter to enter the booth alone, and in many instances the proof shows that voters, without having taken the oath required by statute, were accompanied into the booth and assisted in the selection or folding of their ticket, or both.

In this last-mentioned district it also appears that both parties were guilty of this disregard of the law in respect to booths. Democratic workers in large numbers, and republicans watchers and workers in less numbers, but no less openly, accompanied voters into the booths as above stated.

In one district (seventeenth), the polls were opened at sunrise, although heretofore they had not been opened until eight

o'clock. And the contestant alleged this as elements of impropriety.

The opening and closing of the polls is clearly a directory matter. (*People v. Cook*, 8 N. Y. 92.)

Besides, the proof shows, by republican witnesses called by the contestant, that, in 1892, the polls in this district (seventeenth), were not opened until nearly nine o'clock, and that much fault was found by voters generally throughout the district. This would seem to be a justification for opening the polls at the hour stated.

There is also proof that, in one district (fourth), the registry list for the election of 1893, instead of being copied from the poll list of 1892, was copied from the registry list of 1892, and contestant claims this invalidates the registration for that district. This precise question has been passed upon by the Court of Appeals:

"It is not essential to the validity of a register of elections that the board use in preparing the preliminary register the poll list of the last election."

"The board is not required to enter into the register the names of all persons appearing upon the poll lists of the last preceding election. It is directory only, and their omission to do so is not a violation of the act." (*People ex rel. Frost v. Wilson*, 62 N. Y. 186.)

It was found that in some cases there were errors apparently on the poll lists as to parts of names or mis-spelled names, or errors as to numbers of places of residence; so, too, other minor matter, apparently irregular, appears in several of these districts.

The provisions of the Election Law are of two kinds; those which may be said to be directory and those which are manifestly mandatory.

It is the opinion of your committee that in none of the matters which may be regarded as directory, the proof would show the law to have been violated to a degree sufficient to justify a dis-

regarding of the returns in any of the election districts assailed, excepting perhaps the thirteenth election district, which will be considered hereafter.

While the proof shows these illegal and fraudulent votes in these several election districts, it does not appear that they were cast for Mr. Douglas, nor that in any wise he was cognizant of anything illegal in reference to the election.

The returns in each of the election districts are in due form and are to stand unless overthrown by clear evidence of irregularities, invalidities or fraud on the part of the inspectors sufficient to change the result.

It has already been shown that unless the returns in several election districts are disregarded, the contestee will have a clear plurality of the votes cast.

Anticipating the possible action of the committee in disregarding the returns of the thirteenth district, in which the grossest irregularities seem to have occurred, the contestee to overcome the deficiency, which would appear if the returns in this district were disregarded and which might leave him in an apparent minority, has proven that, at least one hundred and thirteen votes were cast for him in this district.

So that if the return in this (thirteenth) district was disregarded, and the sitting member be deprived of the majority shown for him by the return from this, the heaviest democratic district, the result will still be to prove the election of the contestee.

The following is a summary of the testimony on the basis of disregarding the votes in the thirteenth district — allowing each candidate the vote actually proven in this district — and deducting from contestee every proven illegal vote in the entire Assembly district:

According to the returns, Douglas' vote.....	4,874
Deduct his vote, thirteenth district	232
Douglas' vote, excluding thirteenth district.....	4,642

Deducting every alleged illegal vote, fourth district	36	
Sixth district	15	
Eighth district	4	
Ninth district	17	
Seventeenth district	20	
		<hr/>
		92
		<hr/>
Douglas' vote	4,550	
Ablett's vote, as per returns	4,602	
Deduct thirteenth district	13	
		<hr/>
	4,589	
Add his entire vote proven in thirteenth district..	51	
		<hr/>
	4,640	
Requiring Douglas to prove to produce a tie.....		90
		<hr/>
		4,640
But the number of votes proven given for Douglas in this district was		113
		<hr/>
		4,527
		<hr/>

Not only meeting the vote of Ablett (the return in this district being disregarded), but an excess of twenty-three.

Thus taking from the vote of the contestee every proven illegal vote in the Assembly district, disregarding the return in the thirteenth election district and crediting the contestee only with his vote actually proven in that district, and also crediting the contestant with the vote actually proven for him in the disregarded district, a plurality still remains for the contestee, who thus appears to have a plurality of the votes in the Assembly district, and he is entitled to retain his seat in this Assembly.

Your committee, therefore, recommends the adoption of the following resolution:

Resolved, That the petition of Amos J. Ablett, claiming to have been elected member of Assembly from the fourth Assembly district of the county of Albany, be, and the same hereby is dismissed, as the allegations therein contained have not been proven.

Resolved, That Hon. Curtis N. Douglas was legally elected at the general election in November, 1893, as member of Assembly from the fourth Assembly district of the county of Albany, and is entitled to retain the seat now occupied by him as such member of Assembly.

Albany, April 9, 1894.

VICTOR J. DOWLING,
HENRY McNAMEE,
JOHN C. HARRIGAN.

The House took no action on the above reports and Mr. Douglas was allowed to hold his seat until the end of the session, although Mr. Ablett was declared to be legally elected by the majority report of the committee. The report was made to the House on April 9th, and the Legislature adjourned April 26, 1894.

Assembly Journal, 117th Session, 1894.

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